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ABSTRACT

The fall 1990 issue includes essays that recapture some of the presentations and thinking of the 1990 American Bar Association annual conference on higher education, entitled "American Citizenship and the Constitution." The idea of community was a recurring theme of the conference, and is the focus of three essays included in the Fall 1990 issue: "Liberty and Community: Values in Tension" (Donald P. Kommers); "'Our Town' or 'Twin Peaks': The Dark Side of Community" (Paul R. Joseph); and "Diversity and Citizenship" (Rachel F. Moran). This issue also includes the articles: "Against the Socratic Method: Fostering Student Self-Confidence and Intellectual Independence" (Susan R. Burgess); "An Invitation to the Dance: A Reply to Professor Burgess" (Lief H. Carter); "Whatever Happened to...? A Look at York University Law and Society Graduates" (Jane Banfield Haynes); and "Supreme Court Justices in the Classroom: In Their Own Words" (Robert X. Browning; William P. McLauchlan). The spring 1991 issue contains the following articles: "Teaching Civil Liberties in the Bicentennial Year" (Joel B. Grossman); "Actively Engaging Students in Study about the Law" (Tom Sweeney); "Using Law as an Interpretive Framework for the Study of American History" (Shirley J. Burton); "Law, Literature, and Humanistic Study" (Robert J. Christopher); and "Enriching the Classroom through Alliances with the Local Bar and Other Community Groups." (DB)

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FOCUS on Law Studies

Teaching about law in the liberal arts

FALL 1990
Volume VI, Number 1

American Bar Association

Citizenship, Community and the Constitution

by John Paul Ryan

American Citizenship and the Constitution was the theme of the ABA Commission's 6th annual higher education conference, held this past May 3-5 at the Abbey Resort on Lake Geneva, Wisconsin. About seventy-five faculty from a wide range of disciplines and from colleges and universities throughout the country attended the two-day conference, designed to explore what it means to be a citizen today and how the Constitution has shaped these meanings.

This issue of *Focus* recaptures some of the presentations and thinking from a highly stimulating conference. The idea of community – how it is defined, by whom, whether it's good or bad – was a recurring topic throughout the conference. Indeed, the closing session addressed efforts by colleges to establish or enhance a sense of community on campus in the face of increasing divisiveness. Linda Greene, Professor of Law at the University of Wisconsin Law School, sparked a lively exchange among conferees about the desirability, and constitutionality, of efforts by universities and colleges to curb "hate speech."

In discussing the society at-large, "community" is viewed very differently by the authors of three articles beginning on page 4 of this issue. Donald Kommers, Professor of Political Science and Law at the University of Notre Dame, views community as a positive, but an ideal made increasingly more difficult to achieve by – among other things – the Supreme Court's relentless expansion of individual rights, particularly, the right of privacy. Paul Joseph, Professor of Law at Nova University, views community in a very different and much darker light, one that sees individual freedom threatened by utopian visions of community. Finally, Rachel Moran, Professor of Law at the University of California at Berkeley (Boalt Hall), views community through the lens of diversity. She explores, for example, how members of different racial, ethnic, and gender groups experience citizenship differently, as well as the concomitant need for educational institutions at all levels to recognize and validate different experiences.

Clarence Page moderates ABA Public Forum

These issues were also discussed from other points of view in a Public Forum that initiated the conference. The Forum was attended both by participating faculty and more than 100 invited members of the public from the Milwaukee, Madison and adjoining areas. Clarence Page, award-winning columnist and commentator based in Chicago, moderated a diverse panel of business, community and civic leaders and educators, as they discussed and debated what constitutes a "good citizen" in late 20th century America.

These issues, of course, are not without implications for the classroom. Both the ideas themselves and the pedagogical tools used to teach them were the subjects of discussion in panels and workshops. One important debate that surfaced concerned the value of the Socratic method in teaching undergraduate students about the Constitution and its interpretation by the Supreme Court. Conferee Susan Burgess, Assistant Professor of Political Science at the University of Wisconsin, Milwaukee, questions the combative style of the Socratic method and proposes, instead, a teaching model based upon cooperation and mutual respect, designed to foster intellectual independence. Lief Carter, Professor of Political Science at the University of Georgia who demonstrated the Socratic method at the conference, responds.

We hope you, our readers, will be as stimulated by these exchanges as the conferees in Lake Geneva. Your responses to these scholarly and pedagogical issues are invited.

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FROM THE EDITOR

Letters

Dear Editor:

John Paul Ryan's recent review (5 *Focus*, Spring, 1990, p. 3) of courses and pedagogical approaches in criminology and criminal justice posits, albeit unintentionally, a narrow perspective of the discipline. Adopting essentially a Technical-Vocational description (see Dorothy Bracey's article in 1 *Focus*, Spring, 1986, p. 4) of criminal justice courses, the article describes fact-laden descriptive coursework which fails to challenge students to engage in critical thinking or to understand the intersection of law, society, culture and politics. Exceptions to this bleak educational landscape are courses taught by sociologists in criminology and specialty courses which "don't fit neatly into these categories."

While this perspective may be accurate in describing many traditional criminal justice courses, many departments have advanced beyond this limited approach to analyzing the criminal justice process. At Memphis State University criminal justice coursework has become part of the general education curriculum. This coursework is designed not to teach students about criminal justice but to provide them the opportunity to learn about human beings and social institutions through the study of the criminal justice system. The *Introduction to Criminal Justice* course directs attention to the relationship between individuals and social institutions by examining political and social theory and practice within the context of the criminal justice process. *Comparative Justice Systems* examines the relationship of power to the functions of social institutions by inquiry into the various social, cultural, economic and historical forces that shape systems of justice in the world. Both courses utilize a wide range of pedagogical approaches. Writing assignments include daily journals, interpretive essays, book critiques, and research papers designed to foster the student's ability to learn to write and to write to learn. Class discussions, individual and group presentations, debates and mock juries engage students in the process of learning, making them participants in the process and not merely the receptacles of the professor's notes.

Additionally, development of these courses has affected the manner in which courses throughout the department are taught. Focus has been directed upon students developing an understanding of basic social science concepts and methodologies in connection with knowledge of the philosophical, political and cultural milieu of which the criminal justice system is a part. Overall, emphasis is not on teaching students about the criminal justice system but upon providing students with the opportunity to learn from the criminal justice process. At Memphis State, and from discussions with faculty at other institutions, it is clear that the discipline has broadened its approaches, in many instances becoming a broad-based program without having changed the name of the department.

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Editor Replies: I agree with Professor Janikowski that the approach he advocates is a desirable one. However, based upon conversations with faculty and our Clearinghouse syllabi, I have the impression that this approach to criminal justice remains the exception, not the norm. We invite the contribution of syllabi from faculty teaching the types of courses described by Professor Janikowski.

Reader Survey Results

The Fall 1989 issue of *Focus* contained a first-time reader survey, designed to elicit evaluations and suggestions for improvement. More than 120 responses were received, a healthy response given that we chose, for cost considerations, not to utilize a separate mailing.

This sample, though relatively small and not random, appears to be somewhat representative of *Focus* readers generally. Faculty, for example, were from all types of institutions – about equally from liberal arts colleges, comprehensive universities, and research universities, less often from community colleges. Political science, sociology, criminal justice, and business were the most frequent disciplines represented. The faculty were veteran teachers, three fourths of whom have taught more than 10 years. And all four geographic regions were well represented, though a disproportionately higher share of responses came from the South.

Readers typically rated *Focus* either "excellent" (55%) or "good" (42%). They especially praised its interdisciplinary nature and thought-

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FOCUS *on Law Studies*

Teaching about law in the liberal arts

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Focus on Law Studies is published twice yearly by the American Bar Association. It offers a forum for ideas, resources, analysis, and opinions on teaching about law in the liberal arts. Opinions and positions stated in individual articles are those of the authors and not necessarily those of the American Bar Association or the Commission.

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Supreme Court Justices in the Classroom: In Their Own Words

by Robert X Browning and William P. McLauchlan

If you cannot take your students to the Supreme Court, perhaps you should bring the Supreme Court Justices into your classroom. A set of videotapes and videoguides available from the Public Affairs Video Archives at Purdue University permits just that.

Using a small grant from the ABA Commission on College and University Nonprofessional Legal Studies, the Video Archives developed prototype classroom materials that enable the instructor to bring the operation of the U.S. Supreme Court to the students. The project illustrates the justices presenting their individual thinking on subjects ranging from separation of powers and judicial activism to their fellow justices and the nexus between law and politics. The Supreme Court Justices Project developed nine videotapes of specific public addresses by each of the nine justices, as well as a tenth tape that is a composite of excerpts from the original nine.

In the series, Justice Blackmun discusses the 1988 Term of the Court and, with surprising candor, each of his eight colleagues. Justice White presents an outline of judicial restraint, which can be compared with brief comments on the same subject by Justice Stevens. Justice O'Connor discusses women's rights and the Constitution, and Justice Marshall reminisces about his days as a civil rights lawyer. Chief Justice Rehnquist discusses the history of judicial independence and the significance of that independence for the operation of our system of government, and Justice Kennedy talks about his first few months on the Supreme Court. The tapes vary in length from 17 to 79 minutes, and each tape is accompanied by a videoguide.

The videotapes provide the undergraduate instructor with a number of pedagogical tools that will interest students a great deal. The materials can be used for a variety of classroom exercises and projects which enrich the students' understanding of the Court, Constitutional Law, and the justices.

In-Class Discussions

This might involve showing one of the tapes in class. This would substitute for the appearance of the justice in the class and provide a point of departure for class discussion of the material and subjects covered in the tapes. After showing the tape, a particular discussion question might be posed, relating to the tape or to a general topic tangentially touched on in the tape.

The videotapes illustrate the Justices' thinking on many subjects.

Out-of-Class Assignments

An instructor could assign a tape to each student or to a group of students. Then, the instructor could (1) have the student(s) summarize the discussion presented in the tape and report back to the class; (2) pose one or more questions for the student(s) to explore while viewing the tape; and/or (3) have the student(s) use the tape to analyze a particular constitutional law issue, such as strict construction or original intent. These assignments could involve either written or oral in-class reports. They might simply involve the development of a notebook by the student(s) or serve as research materials for a formal paper.

The value of these types of projects is that they provide the students with first-hand exposure to the people who *are* the Supreme Court. Futhermore, the student can gain an appreciation for the fact that these justices talk about the kinds of subjects that are treated in a judicial process or constitutional law course. Lastly, the content of the justices' comments clearly indicates that they are contributing to various public and academic debates with which the students are likely to be familiar.

The student audiences for these materials range from the high school government class and the introductory American Government course in college, through upper division college courses on Constitutional Law and Constitutional Interpretation. These might also be utilized as raw materials for research methods courses relating to discourse or content analysis. And they could provide useful materials for civic programs and public lectures, if integrated properly.

The project developed a videoguide for each tape. Each videoguide provides instructors with relevant information regarding the context of the speech, the content and length of time devoted to topics, background on the justice, discussion questions which permit an initial entree into the tape, and a short, current bibliography which provides some reading materials either for the instructor or the students.

The Purdue University Public Affairs Video Archives was established to make C-SPAN programming accessible to teachers. This is done through cataloging, through the distribution of tapes, and now through the development of videoguides to highlight and supplement the tapes. To learn more about the Archives and to obtain copies of the Supreme Court Justices series, contact the Public Affairs Video Archives, Purdue University, Stewart Center G-39, West Lafayette, Indiana, 47907; telephone (800) 423-9630.

Robert X Browning is Director of the Public Affairs Video Archives and William P. McLauchlan is Associate Professor of Political Science, both at Purdue University, West Lafayette, IN 47907. Under a 1989-90 ABA Mini-Grant, they developed the Supreme Court Justices series.

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Liberty and Community: Values in Tension

by Donald P. Kommers

I wish to offer some reflections on the tension between the values of liberty and community under the American Constitution and to do this within a comparative framework. Let me begin by suggesting that the purpose of most liberal constitutions is to preserve the values of both liberty and community. We Americans are the heirs to at least two traditions that coalesce around these values: one of these traditions we associate with the ideas of republican virtue, social discipline, and the common good; the other we associate with the ideas of natural rights and individual freedom. For much of our history, these two traditions nourished and reinforced one another. Today, however, the relationship between these values seems to be very different from what it was in the 19th century. Under the influence of modernity, liberty appears to have been disengaged from common good reasoning and social discipline. *Cohen v. California* (403 U.S. 15 [1971]), a seminal free speech case, is emblematic of this change. There, the Supreme Court favored the venting of an individual's "inexpressible emotions" over the public's interest in reasoned discourse. As the expanding right of privacy also illustrates, liberty has been redefined as autonomous individualism, overriding countervailing claims based on utility or social morality. In Lawrence Friedman's characterization of our changing legal culture, we Americans have created a "republic of choice" in contrast to an earlier culture that prescribed a balance between choice and restraint.

It is questionable whether we Americans can any longer speak sensibly of *e pluribus unum*. Our best philosophers tell us that the oneness once derived from many has degenerated into a tower of Babel. In their view our diverse society has become a divisive — and thus non-communicative — one. Wherein lies the communality or solidarity of the national community? Many Americans seem to derive their true identities from allegiances rooted in language, ethnicity, religion, geography, or cultural background. These *natural* communities are the most likely

places where Americans today can expect to enjoy human relationships based on genuine cooperation, reciprocity, and communication. They have an important role to play in giving meaning and vitality to American life. Law, especially constitutional law, could be of help here. Yet the Supreme Court is unwilling to support, much less to constitutionalize, attachments based on these natural communities. In the Court's vision of modern America, we are a society of autonomous moral agents unbounded by any grounding in ancestral or historic attachments.

I have doubtless overdrawn this picture, for there are cases in which the Supreme Court has sought to reinforce relationships deeply rooted in our culture. *Wisconsin v. Yoder* is the best example. Here, the Court protected the integrity of a biblical community over against a state educational policy that might have resulted in its disintegration. By exempting the Amish from Wisconsin's compulsory education law, the Court reinforced a life-style based, not on personal choice, but rather, on a long-held, historically determined set of shared convictions about life and its meaning.

In any event, however much we would long to recover a past in which liberty and community were locked in some kind of mutual embrace, there is a sense, as I've tried to indicate, in which American life as envisioned by the Supreme Court is perfectly compatible with the Constitution as presently interpreted. If the Court's analysis of American society is right, if we have increasingly privatized our liberty and our lives, if personal fulfillment is life's main goal, if our lives have turned inward, and if freedom now means the right to choose or to do our own thing, little wonder then that the Supreme Court places privacy and expressive individualism at the top of our constitutional value system. *Roe v. Wade* makes perfect sense in a society of this kind.

But if ours is a "republic of choice," as Friedman suggests, what then is left of community? of citizenship? The Preamble to our Constitution talks of *we the people* and our desire to establish a *more perfect union*. The Constitution is said to have recreated — or reconstituted — us as a people. But what kind of a people? What kind of community? I suggested earlier that it was a community that combined liberty with a deep sense of belongingness as well as a tradition of republican virtue. But this community — one based on *e pluribus unum* — appears to have disappeared. Would we wish to recover or reappropriate, even if we could, this older tradition of social discipline, common good thinking, and communality based on historic identities or allegiances?

Let me now switch the scene to other constitutional democracies, particularly those of West Germany and Japan. A comparative approach can serve as a vehicle not only for interpreting the meaning of social life in other societies but also for seeing ourselves through a glass more clearly.

Under West Germany's Constitution — the Basic Law — the ideal of freedom, as Professor Cole Durham recently remarked, "tends to be seen not as the polar opposite of community, but as a value that must be achieved in synthesis with community." The Bonn Constitution resounds with the language of human freedom, but a freedom restrained by certain political values, community norms, and ethical principles. Consider the area of reli-

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'Our Town' or 'Twin Peaks': The Dark Side of Community

by Paul R. Joseph

The longing for community is eternal and understandable. The vision of harmony in which all have common goals and problems are solved through cooperation may bring to mind an image of an early Christian or 19th century utopian community, a communist collective, or an Israeli Kibbutz. That the history of such collectivist experiments has ranged from moderately successful at best to nightmarish at worst has not deterred many from embracing this vision.

Yes, groups are important. At best they provide support, participation, a channel for collective energy, security, comfort, and mutual protection to the individuals who comprise them. That is their purpose. The group exists for those individuals in it. Individuals do not exist for the group.

The central danger in community theories is that an overemphasis on community may lead proponents to support subordination of the individual to the group. This could lead to a notion of group rather than individual rights. Without exaggerating, I state that down this road lies repression and murder.

Perhaps I need to talk about rights. By rights I do not mean preferences. I do not mean "desirable social goals." Rather, I mean the term as it has traditionally been understood, as enforceable claims, as trump cards (see Dworkin). Rights are claims on others. They are reciprocal (see Hohfeld). To say that someone has a right implies that others have a duty.

For example, if I want the minimum wage increased, I am obligated to convince the peoples' representatives that my idea is good. But if I assert that "I have a *right* to such an increase," I am making a very different statement, a claim upon society. I am asserting that Congress *must* adopt my measure and has not the legitimate authority to refuse.

This is why most rights are negative ones. The First Amendment, for example, does not guarantee "free speech." It guarantees that government "shall make no law. . . abridging the freedom of speech." It neither requires the government to assure you a podium nor to buy you a newspaper.

Properly understood, American political theory has two parts, majority rule and individual rights. Majority rule applies when individual rights are not involved. When preferences conflict, the preference which predominates wins. Where individual rights begin, however, the legitimate power of

What begins as community can become xenophobia.

the majority ends. My religious views, for example, are for me alone to decide. No other, no aggregate of others, no government may decide the issue for me. No matter how many others vote to establish a state church, the decision to do so is illegitimate and beyond the scope of government. In our Constitution, the Bill of Rights recognizes these limits on community authority and promises that these limits will be respected by the community.

Without a theory of individual rights there is no check on majority tyranny. The concept of rights, however, makes no sense unless rights exist in each individual rather than in the group as a whole; each person has rights solely because she/he is a human being, and individual rights are antecedent to groups.

The most extreme example demonstrates the difference. If rights belong to groups – the majority, Congress, the German people, the white race, etc., then the group could legitimately kill one of its members. In the Crito, Socrates refuses to escape the unjust death sentence imposed upon him, and makes the following argument on behalf of the state community, "Can you deny in the first place that you are our child and slave, as your fathers were before you? And if this is true you are not on equal terms with us; nor can you think that you have a right to do to us what we are doing to you." If Socrates is wrong, it is because the *individual* has rights which the group cannot legitimately take away. If rights belong to groups which grant them as gifts to individuals, they are not rights at all but merely *privileges* granted by the group's largess and revoked at the group's pleasure. Only if rights exist in individuals inherently and apart from our membership in a group, is there any basis for asserting that human rights exist which the community cannot violate.

This is the meaning of the assertion in the Declaration of Independence that each person is "endowed by the creator with certain inalienable rights." Whether one interprets the word "creator" to mean God or the evolutionary process of nature, the essence of the assertion is that rights are not gifts from other people or groups but are an inherent part of being a human being.

Efforts to build community awareness and cooperation can improve the quality of life so long as individual rights are acknowledged and respected. We must recognize that rights limit community power even when acting to create a majoritarian or dominant vision of the "good life." Where rights are concerned, if we cannot persuade our fellows, we lack the legitimate authority to compel them. Thus, some choose to burn the American flag which is deeply offensive to many. Some choose to read, write, or sing words which are racially or sexually offensive to many. Neither can be banned. Neither the flag burner nor the bad speaker may be jailed.

When some people rhapsodize about community, groups, the collective, or whatever, the image painted is benign. It is either an image of perfect agreement with their own view of morality or a vision of perfect toleration. The reality is that when human beings are allowed to think for themselves, they of-

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Diversity and Citizenship

by Rachel F. Moran

Before you begin reading this essay, try to recall your first political memory. How old were you when the event happened? How would you have described the event at the time? Most children begin to develop a political awareness by the third or fourth grade, and they are more apt to remember national political figures and events than local ones. Having conjured up your first political memory, compare it to this explanation of Watergate by a nine-year-old, white girl from a Boston suburb, which is recounted in Robert Coles' book on *The Political Life of Children*:

> The President made a mistake. It's too bad. You shouldn't do wrong; if you're President, it's bad for everyone when you go against the law. But the country is good. The President must feel real bad, for the mistake he made.

Now contrast this child's account to a thirteen-year-old Hopi girl's description of Watergate, again taken from Coles' book:

> The news of Watergate is a dark cloud. The sky was clear, and the hunters ran wild; then dark clouds gathered and rain fell, and the hunters stopped for a while. Will we soon get more hunters, just as greedy? Or will we learn to control greed, so that we don't just pray and pray for bad weather to stop the hunters in their tracks?

How does your own first political memory compare to these children's recollections of Watergate? If you are struck by the differences between these two passages and how each contrasts with your own first political memory, then you should be concerned about the implications of racial, ethnic, linguistic, and cultural diversity for our conceptions of political life in general and civic education in particular. In this essay, I will examine how heterogeneity has shaped images of the state and how these images in turn have influenced citizenship training in the schools.

In a homogeneous community, policymakers can presume that the citizenry shares basic values. Citizens

thus will be able to empathize with their fellows and surmount differences of opinion. Precisely because of these shared values, then, the state can embrace civic republicanism; that is, the state can rely on broad-ranging deliberations among citizens about their values to achieve consensus about the common good.

Whether this image of the populace was ever accurate, schools often have relied on a model of civic republicanism in inculcating good citizenship. In a homogeneous community with an active citizenry, educators can assume that students have similar political experiences in the home and other informal social settings. Thus, pupils arrive at school with comparable perceptions of political life. Because families and friends presumably have transmitted the fundamentals of good citizenship, educators can rely on classroom ritual to affirm shared political values. For example, teachers can ask students to recite the Pledge of Allegiance without much comment, secure in the belief that all pupils share a common understanding of it.

Even in schools with a homogeneous student body, one could argue that teachers should explain the basis of citizenship and loyalty, rather than take for granted that families and friends have inculcated appropriate values. But with a heterogeneous school population, the luxury of unreflective patriotism simply cannot be indulged. If students come to the classroom with distinctive perceptions of political life, ritualistic exercises will often lead to confusion and alienation. For instance, Robert Coles reports the difficulties one white school teacher in Alabama encountered in engaging black students in uncritical patriotic observances:

> I have a very bright boy, James; he told me that he didn't want to draw a picture of the American flag. I asked him why not. He said he just wasn't interested. It's hard for them — they don't feel completely part of this country. . . . A lot of times I skip the salute to the flag; the children start laughing, and they forget the words, and they become restless. It's not a good way to start the day. I'd have to threaten them, if I wanted them to behave while saluting. So, we go right into our arithmetic lessons.

This anecdote suggests what other studies have repeatedly shown: Black children experience political life and classroom ritual differently than white children do. In a review of relevant research entitled *Political Socialization of Black Americans*, Paul Abramson found that black students consistently reported lower levels of political efficacy and trust than white students. As this evidence makes painfully clear, with a diverse student body, schools must justify and not merely assert a duty of loyalty. To establish the foundations of allegiance, schools have to elaborate for students the nature of their relationship to the modern state.

Some commentators have argued that as the citizenry has become increasingly heterogeneous, the state has resorted to "thin" democracy. That is, the state has limited itself to regulating the pursuit of individual interest through formal rules of access without examining the origins of personal preference very closely. In a thin democracy, the state treats individual interests as fungible; in this way, individuals are decontextualized, abstracted from the racial, ethnic, linguistic, and cultural environments that

prompt them to form distinctive preferences. What matters in the state's calibration of individual interests is that individual choices not be misrepresented or inappropriately coerced; otherwise, the diverse social origins of choice are irrelevant to the weighing of individual interest. Moreover, citizens themselves are not required to come to grips with the polity's heterogeneity except as necessary to develop strategies for advancing personal interest. In a thin democracy, the citizen's obligation is merely to observe rules of fair dealing when bargaining to optimize self-interest; the citizen need not transcend a parochial perspective by attempting to identify with others' concerns.

In a thin democracy, educators cannot assume that students enter the classroom with similar views of political life. Civic education, therefore, must go beyond ritual patriotic exercises. The schools' mission consists of communicating basic rules of fair play in the governmental decisionmaking process and fostering respect for them. As Harold Entwistle notes in his book, *Political Education in a Democracy*, educators focus on high-level political institutions, such as the Presidency, Congress, and the Supreme Court, to which students generally have no direct access. The only act of participation that students learn about is the right to vote. Often, an oversimplified view of voting is communicated in which individuals, acting independently, reflect on candidates and issues rationally and cast their votes accordingly. In sum, then, under a thin democracy, civic education reflects the political system's preoccupation with formalism as the touchstone of fair dealing.

The rise of thin democracy with its minimalist conception of citizenship has sparked considerable concern. Commentators recently have noted the alienation and loneliness that inhere in the atomistic, self-absorbed pursuit of personal interest. Many have expressed dissatisfaction with treating a citizen's interactions in the public forum as just a series of arms'-length bargains. In these critics' view, confining the state to the role of political powerbroker inevitably leads to its delegitimation; only a richer and more meaningful construction of citizenship in the modern republic can preserve the state's authority and legitimacy.

Moreover, commentators have decried the emptiness of civic education predicated on thin democracy's commitment to formalism. According to Entwistle, the student "is confronted with an arid collection of facts about eligibility to vote, the relationship of executive to legislature to judiciary, the roles of presidents or prime ministers, or monarchs, how bills pass through legislatures, . . . sterile descriptions about which most children could not care less . . . ." These critics have called for the revamping of citizenship training so that children could learn how to participate meaningfully in the political process.

Civic education must go beyond ritual patriotic exercises.

Despite these calls for reform dating since at least the late 1960's and early 1970's, schools have not moved significantly toward a participatory model of education. This lassitude may reflect nothing more than bureaucratic inertia. However, the reluctance to experiment with a participatory curriculum also could be an outgrowth of thin democracy's tendency to mask group differences through its emphasis on formalism. By treating the formation of personal preferences as a private process exogenous to the political sphere, proponents of thin democracy leave unexamined the importance of group ties, such as those based on race, ethnicity, language, and culture. If decisionmakers might usefully consider these group affiliations in making policy, thin democracy could yield an impoverished public dialogue. These dangers are aggravated if thin democracy springs in part from a fear that acknowledgement of difference will lead to irreducible conflicts that paralyze governmental decisionmaking.

In fact, educators often justify their approach to civic education on the ground that children need to be spared the whole truth about the seamy, contentious, conflictual side of political life. By resorting to formalistic education, schools preserve the appearance of a benevolently ordered political system that transcends group differences. Like a microcosm of this mythic state, the school can aspire to a lofty neutrality and avoid infighting among parents and students by wrapping itself in thin democracy's formalistic principles. Civic education thus exists above the fray of group differences. Unfortunately, however, these differences are apt to persist, and students will not obtain the political skills necessary to address, much less resolve, them.

If racial, ethnic, linguistic, and cultural affiliations are longstanding and significant features of the modern, heterogeneous state, policymakers must confront these differences and consider fashioning a new conception of citizenship that is both participatory and pluralistic. Where appropriate, the state should openly acknowledge diversity and its relevance to the decisionmaking process. The state would continue to set ground rules to ensure that individuals deal fairly with one another in the political process; however these ground rules would serve as procedural nuclei, the seeds for creating forums to facilitate citizen participation in a dialogue devoted to forging an ethic of pluralism in public affairs. Through these deliberations, the citizenry would consider not only values held in common but also those that diverge but must co-exist in the modern State. These discussions would promote a pluralistic ethic by providing opportunities for concrete interactions among citizens from diverse backgrounds. Eventually, an ethic of pluralism would emerge through policies that engender understanding and respect for alternative world views.

In implementing a pluralistic, participatory model of democracy, the state should utilize the schools as a springboard for fashioning an ethic of pluralism. Rather than merely engaging students in perfunctory patriotic rituals or transmitting formalistic rules of fair play, teachers should confront directly the multiracial, multiethnic, multilingual, and multicultural nature of the population and its implications for citizenship. Texts and supplemen-

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gious freedom. Article 7 of the Basic Law – part of the German Bill of Rights – seeks to reinforce personal identities based on religious affiliation. It does this by giving parents "the right to decide whether [their children] shall receive religious instruction [in the public schools]." This and other provisions on religious freedom explain why German church-state relations are oriented toward cooperation rather than strict separation. For example, public school students have a positive right to express their religious selves in public schools, one reason why the constitutionality of school prayer has been upheld in Germany. Indeed, such manifestations of religious belief in the German constitutionalist view is connected with the value of tolerance and mutual respect, the *very opposite* of the individualist rationale advanced in analogous American cases.

One should remember, of course, that in Germany the state plays a major role in promoting the responsible use of freedom. It is duty bound to bring about that "objective order of values" specified in the Constitution *so that* freedom can be exercised in community with others. Needless to say there is something very Kantian about this perspective on liberty. Freedom is to be realized in accordance with reason and universal moral norms, which is quite different from the arbitrary personal decisions permitted in the "republic of choice." To cite Durham again, "arbitrary private choice is not autonomy, but mere heteronomy of the will." Now we can begin to understand why West Germany's Federal Constitutional Court ruled, in a well-known abortion case, that the right to life takes precedence over the individual's right to personal self-determination. The case is, of course, much more complicated than the previous sentence would suggest. What is important for our purposes is that the German tribunal strained hard to balance, within the hierarchy of norms found to exist in the Basic Law, the value of unborn life and the pregnant woman's right to the development of her personality. *Roe v. Wade*, by contrast, vindicated freedom of individual choice to the exclusion of all other social values.

In still another case, and again unlike our Court, the German tribunal declared that a public official is entitled to sue a reporter for defamation if the latter utters a falsehood about the former, even in the absence of malice. In short, political commentators must tell the truth when speaking in the public forum. Clearly, a vision of community is operating here that differs from the American constitutionalist vision of a society composed of rugged individuals who are permitted to say anything they please about public personalities so long as they are not guilty of recklessly disregarding the truth. Contrast this to the following view of Germany's Constitutional Court:

> The image of man in the Basic Law is not that of an isolated, sovereign individual; rather the Basic Law has decided in favor of a relationship between individual and community in the sense of a person's dependence on and commitment to the community, without infringing upon a person's individual value.

What the Japanese have, and what I see less of in the U.S.A., is a keen sense of citizenship.

Let me now switch the scene to Japan. What the Japanese have, and what I see less and less of in this country, is a keen sense of citizenship, that is, a commitment to something far larger than themselves as individuals. Webster defines citizenship as "membership in a community;" he also defines it as "social conduct" and in terms of an individual's "responsibility. . .or contribution to his community." This sense of citizenship manifests itself in the institutional loyalties of the Japanese people. Take work, for example. The Japanese worker identifies with his company; he belongs to it; he sacrifices for it; he takes pride in his job; he is part of a shared enterprise with his employer, and his relationship to his employer is one of mutual support in the execution of a common task. Work in the United States, by contrast, is alienated labor. We Americans don't really belong to our companies. Our companies treat us as commodities, not as citizens. Our system of ownership and production doesn't lend itself to citizenship. Our workers dream of home and family and the barbecue in the backyard. After all, to us that's happiness.

Today we have heard all kinds of nice things about what citizenship means in America. Well, what does it really mean? I'm tempted to say almost nothing. We Americans talk about liberty and autonomy, but do we have any control at all over our political destiny or our economic system? We seem to be as powerless politically as we are alienated at work. That is one definition of the loss of citizenship. I suspect this loss may have something to do with the increasing bureaucratization of American life. I'd like to suggest, however, that it may also have something to do with the increasing privatization of American life. Worse yet, as my colleague Alisdair MacIntyre recently argued, we have even privatized the good, because under the prevailing version of liberal constitutionalism today, particular conceptions of the good have been banished from public law and discourse, thus shrinking the space available for fostering a deeper and more satisfying common life.

We might want to ask ourselves whether our emphasis on private rather than public goods accounts for the disgracefully low voting turnouts in the United States, or our general unwillingness to pay taxes, or our toleration of homelessness, or our love affair with the private car, or the corresponding explosion of suburbia, the epitome of isolation and privatization in America today. I don't know really if there is any way out of this predicament. Of course, we all like and prize our mobility. It's a sign of freedom as well as autonomy. But it also leads to rootlessness and the loss of community ties and, thus, to the loss of citizenship in the sense understood by the Japanese.

If this analysis of law and society is correct – and it surely is not original

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Dark Side of Community
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ten resolve questions differently and act contrary to others' desires. People are wonderfully complex and diverse. We differ even about fundamental matters. That which one person likes deeply offends another. Groups (the majority or ruling elite) often feel threatened by this diversity and seek justification for suppressing dissent. If you argue that the community is paramount, then you have provided that justification.

Historically, communities have built group strength by narrowly defining who is and is not a member of the group, by treating non-members badly, and by suppressing dissenting voices within the group itself. The "need" for unity often manifests itself in repression. When the group *"uber alles"* mentality prevails, suppressing threats to the group becomes paramount. What begins as community can become xenophobia and degenerate into destruction of dissenting group voices. Dissenters in the group are branded dangerous "outsiders" who threaten the group and must be destroyed.

The repressive collectivism of the Puritans is well-known. Dissenters were expelled or punished severely for deviation from the community standard. The witch hysteria appeared as the colony was challenged economically and socially by increasing contact with the outside non-Puritan world. "Witches" were burned to "protect" the community.

The long struggle by Blacks, Asians, Hispanics, Native Americans, and others for equality can be understood partly as a struggle to be recognized as part of the political community. America often exalts community over individual rights and is often unwilling to recognize the rights of those not accepted by the majority as part of the community. The Supreme Court made this brutally clear in its infamous *Dred Scott* decision. The Court asked, "Can a negro. . . become a member of the political community formed. . . by the Constitution?" It answered "No." "Whether emancipated or not [the negro] had no rights or privileges but such as those who held the power and the government might choose to grant them." Rights come from groups, the Court says. Unless we deem you part of the group, you have no rights.

Other examples include the madness of the McCarthy era, our modern witch hunt; the internment of Japanese-Americans; and the tragedy of Jonestown, community gone mad. Iris Marion Young recently wrote:

> Racism, ethnic chauvinism, and class devaluation . . . grow partly from a desire for community, that is, from the desire to understand themselves and from the desire to be understood as I understand myself. Practically speaking, such mutual understanding can be approximated only within a homogeneous group that defines itself by common attributes. Such common identification, however, entails reference also to those excluded. In the dynamics of racism and ethnic chauvinism in the United States today, the positive identification of some groups is often achieved by first defining other groups as the other, the devalued semihuman.
>
> (from "The Ideal of Community and the Politics of Difference," in Nicholson (ed.), *Feminism/Postmodernism*. Routledge: 1990, pp. 311-12.)

Despite popular myths of the benign community (a happy "Our Town" of the mind), the conflicting, turbulent images in "Twin Peaks" are closer to the truth. To find the triumph of "community," visit Lebanon.

It is ironic that community theories are gaining acceptance in some liberal and feminist circles just as radical fundamentalists step up their campaign to destroy a woman's right to control her body, to impose their particular brand of Christianity on all, to censor books, films, and song lyrics, and to attack alternate life-styles. The radical fundamentalists are hostile to individual rights and exult majority control and "community" standards. If the principle of individual rights is weakened or replaced with the centrality of community, all of us are fair game for repression when we happen to be in the minority.

The choice comes down to this. Either individuals have rights or individuals have only the privileges which groups give them. An individual is a sovereign creature or a component part of a larger group. The two roads diverge so sharply that it is impossible to follow both. Choose carefully. Your life and liberty depend on it.

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tary materials would include discussions of how our diverse origins have shaped our political life and history. Teachers also could create mock problems that implicate racial, ethnic, linguistic, and cultural differences; through discussion of the problems, pupils would become aware of their different backgrounds and perspectives. In a heterogeneous classroom, the problems could be drawn from the school and immediate community; in a more homogeneous classroom, students would engage in role-playing. Moreover, teachers could encourage students to explore the historical roots of their homogeneous communities as well as their consequences for political life in a heterogeneous state. These exercises would provide students with insights into how to participate in governmental affairs in a heterogeneous state. Students could learn both that broad consensus cannot always be achieved and that there are costs to the untrammeled pursuit of self-interest. At the same time, pupils would discover the social origins of their choices and how they contrast with those of students from distinctive backgrounds. Hopefully, students would gain a newfound respect and tolerance for divergent beliefs and customs.

Through a program of education for participation in a pluralistic democracy, no pupil would treat the Pledge of Allegiance as an act of self-abnegation. Instead, each student would consider this oath an affirmation of the opportunity to join in the ongoing dialogue of a nation joined in diversity and celebrating its difference.

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Against the Socratic Method: Fostering Student Self-Confidence and Intellectual Independence

by Susan R. Burgess

In this piece, I will argue that even the most well-intentioned use of the Socratic method counters the goal of deepening independent and balanced student thought about complex constitutional issues. This piece grew out of my reaction to a demonstration of the "Socratic method" that Professor Lief Carter gave at the ABA's recent conference on "American Citizenship and the Constitution."

First, I should note that the Socratic method, as currently practiced, differs significantly from the teachings of the Socratic dialogs. Most importantly, professors currently using the Socratic method force students to participate in class. Typically, the professor will "randomly" call on students, forcing them to answer a specific question. Socrates, on the other hand, did not force his interlocutors to debate. Ironically enough, Socrates was forced to participate in various debates about justice and the good, or politics and philosophy, which ultimately led to his death (see, e.g., *Republic*, 327b-328b). Furthermore, Socrates was not in a position of power over his interlocutors. The modern professor, on the other hand, is in a position to adversely or positively affect students' grades and educational or career plans. Students are keenly aware of this power differential.

In any case, Professor Carter, and most others who participated in the workshop, contended that the Socratic method would facilitate broader participation and deepen students' understanding of constitutional issues. I, on the other hand, argued that the Socratic method, at least as currently practiced, destroys the mutual trust and respect necessary for developing self-reliant students who value and enjoy participating in complex constitutional debates.

Forced participation is premised on a lack of respect and trust for the student. Professors who force students to participate assume that students will not adequately prepare for class and think about the assigned materials unless the professor forces them to do so by threatening to lower their grades, or by exposing their "ignorance," and thus humiliating them in front of their peers. In short, the professor assumes that students are fundamentally lazy and that they can best be "motivated" by the fear of threatened negative sanctions. Rather than showing students that reflection, participation, and deepened understanding are pleasurable in their own right, students who are forced to participate learn to fear their superior, the professor, and to associate education with punishment.

Forced participation also fosters distrust between the student and professor. Professors assume that students who fail to answer their questions sufficiently have not prepared for class or are not competent college students. Yet, there are a host of reasons, besides laziness, why students might be reluctant to participate orally. Rather than assuming student laziness, professors would do well to remember the anxiety, uncertainty, and reluctance that they must have felt the first times they spoke publicly in unfamiliar situations. Although forced participation may not severely harm students who have already attained higher levels of self-confidence and independence, it does not teach other students how to do so, and it undercuts whatever tentative steps they have taken in that direction. The Socratic method compels students to direct their energy toward the professor, rather than toward their education. Compliant students adulate the all-powerful professor, while more spirited students defy the professor, or perhaps attempt to disprove the professor's assumptions about his or her incompetence or laziness.

The Socratic method also creates an adversarial environment that lessens the likelihood that students will candidly discuss and assess the weaknesses of their own constitutional arguments, as well as seriously consider contending constitutional arguments as plausible alternatives to their own position. In an adversarial environment, students learn to obscure the drawbacks of their own arguments, as well as the strengths of opposing arguments. Thus, students learn to disregard competing arguments, even if they are somewhat compelling.

Of course, professors should encourage students to participate and work hard so that they may eventually become comfortable and confident with their speaking and analytic skills. However, professors would be more likely to achieve those goals by creating a more collaborative environment that fosters the mutual respect and trust that are necessary to encourage students to participate independently and self-confidently. To that end, I suggest the following:

- Let students know that you are realistically hopeful, rather than skeptical, about their ability to develop intellectually.
- Invite students to take responsibility for their own intellectual development by welcoming voluntary student participation early and often.
- Foster student self-confidence by seriously considering and reiterating student arguments at appropriate points in the class period.
- Provide strong leadership by directing discussion, but remind students that you are also questioning and learning.
- Show students that displaying confusion or uncertainty is not necessarily weak or punishable by openly acknowledging when you do not know something.
- Encourage students to deepen their awareness and understanding of the complex nature of constitutional debates by creating written assign-

ments that ask students to locate, understand, and engage the strengths and weaknesses of contending yet equally compelling, constitutional arguments.

- Teach students that education is about more than simple distinction through grades, by treating exams, papers and other assignments as a tool to deepen student understanding and confidence, rather than simply as a grading device. Professors should attempt to structure discussions around those areas *after* the assignment to build students' confidence about their ability to understand and analyze the subject matter of the class.
- Accept that students may not participate, and that they may have valid reasons for doing so.

At first glance, these proposals may seem somewhat modest compared to the force of the Socratic method. However, they achieve lasting results in terms of developing self-confident and independent students who have internalized the value of participating in complex debates, and who will likely act on that value as thoughtful, informed, and articulate members of the polity long after they leave the university.

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An Invitation to the Dance: A Reply to Professor Burgess

by Lief H. Carter

Autobiographical Confession

As a law student at Harvard I was deeply frightened of being called on. I imagined myself as babbling incoherently when this disaster struck. In several instances in Charles Fried's course in commercial transactions in my second year, when my instincts told me my number was up, I climbed up a fire escape outside the classroom and listened in the cold to the discussion through a crack in the door rather than face psychic destruction. So, one who belongs to this persecuted class is not insensible to the damage forced participation can do.

Personal Experience

I always teach Socratically, but I rarely call on people. My teaching style was shaped by experiencing Professor Burgess's truths first hand. I fully agree that forced participation, with its seating charts and check marks and black dots, can prevent many students from engaging comfortably in open and free constitutional debates. And I heartily agree that our teaching must encourage and empower people to have just such conversations.

Specific Disagreements with Professor Burgess

- Socratic teaching need not force anyone's participation. The professor merely creates a context and throws out a well-formed, topical, counter-intuitive, challenging problem and invites everyone to jump in. For example, in the context of right of privacy discussions, I ask "What if Georgia passed a criminal statute, prefaced (like the mandatory vaccination laws) with the statement that its purpose was to stop the spread of a dread disease, that required that 'all males engaging in sexual intercourse with someone other than their legal spouse shall use a condom.'" Spirited and wide participation quickly follows.
- The fear of participating can be minimized by stating in the syllabus that the course grade will not depend on the quality or quantity of participation, and by grading exams anonymously.
- I respect my students but I am not so naive as to trust them. Our students are not motivated seekers of knowledge. Constraints and incentives and threats of failure in education are not some authoritarian residue from our Puritan past. Learning requires them because people are by nature creatures of habit, conformist, instinctively moralistic and simplistic rather than skeptical.
- It's easy to make participation in the classroom pleasurable. Learn everyone's name, form spontaneous debate teams, challenge those who participate regularly to be consistent ("But yesterday I heard you say. . . ."), and above all constantly delight in their efforts and show it.
- Socratic teaching can be communal rather than authoritarian by reversing the flow, by scheduling time for students to question the teacher, or to catch the teacher in confusions and inconsistencies.
- Lecturing has at least as much potential as has Socratic teaching for provoking adulation, laziness, or rote dependencies.
- Professor Burgess conceives, in what strikes me as Pygmalion fashion, that the teacher has the power and responsibility to "make" the student into something independent and self-confident. But we have neither that power nor that responsibility. Our only responsibility — the only way we can teach well — is to role-model how the dance and play of ideas in conversation can connect us lovingly in community. We do this by being ourselves, which means there is no right way, Socratic or otherwise, to teach well. But I do endorse all of Professor Burgess's specific suggestions. They seem essential to good Socratic teaching. They are incompatible only with some "Paper Chase" caricature of Socratic exchange, not the real thing.

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Whatever Happened to. . .? A Look at York University Law and Society Graduates

by Jane Banfield Haynes

Examining what happens in the professional lives of past students can be a highly valuable exercise. This may be especially true when the ex-students are graduates of an interdisciplinary, liberal arts programme like Law and Society, which exists within the spectre of a profession or career. Questions abound. Do graduates mostly go to law school? What other jobs, law-related or not, do they find? How do they utilize the information and skills acquired as undergraduates? And how do they evaluate the Law and Society Programme, its strengths and weaknesses, in light of practical job experience? Below, I provide a few preliminary thoughts on these issues and questions.

In January 1990 I surveyed by mail 71 students who had, in the period 1976 through 1989, graduated from York University in Toronto, Canada with an honours B.A. degree in Law and Society, combined with a second honours major in one of the following departments: Anthropology, Economics, History, Philosophy, Political Science, Psychology, and Sociology. Twenty-three graduates completed and returned questionnaires, about one-third of the total; half were graduates of the first ten year period (1976-85) and half from the last four years (1986-89).

Occupations and Career Choices

Law and Society graduates are working mainly in professional fields. At least ten of the twenty-three hold law degrees (the first law degree in Canada is the LL.B.). Over half of the graduates – thirteen – are in law-related jobs. Seven are practising law or articling law students (i.e., "apprenticed" for a year to a law firm), and six are in such law-related occupations as court administration, parole work, corrections, legal research, etc. Five respondents are in commerce and business, working in such industries as banking, real estate, and insurance.

Information distributed to students about the Law and Society Programme clearly states that it is *not* a pre-law programme and does not lead to, indeed was not intended to lead to, law school admission. Nevertheless, the respondents saw a very close link between the legal profession, law-related jobs, and the programme. Half the respondents chose the programme because of a longstanding ambition to become a lawyer, or chose law as a result of the programme, or used the programme to guide them to various law-related occupations. Four, however, stated that the programme helped them to decide not to go to law school or that it had no influence on career choice. In a sense, all saw the programme as a period of assessment leading to the confirmation of earlier career choices or inclinations, or leading to a continuation of an early non-professional curiosity about law and its place in society.

Strengths and Utility of the Programme

In assessing the programme in terms of personal growth, one graduate wrote, "I didn't gain 'knowledge' so much as the ability to think and to view things from various angles." Others spoke of the programme taking the "magic" out of the "law" and demystifying it, and of the useful exposure to legal theory, especially in relation to the role of law in normative questions of social importance, such as abortion.

A surprising majority of respondents identified the programme courses as a strength. The interdisciplinary nature of course requirements was frequently mentioned as a positive characteristic. For a smaller but still significant number of respondents, the programme prepared them for graduate work or law school. For two women it provided a greater understanding of, and respect for, the rights of the individual, especially those of women. Still others identified the value of learning and using analytic tools, writing long essays, and presenting arguments in seminars.

Perhaps the single most appealing comment – appealing because it embodies the view of programme founders – came from a graduate of the first class (1976): "The programme gave me an opportunity to stand 'outside' and look at how law operates without getting caught in the 'nitty gritty' of it. Most importantly, it raised questions of why law worked the way it did."

The suggestions for improvement were, in the overwhelming majority, of a practical kind. Many said the courses were too theoretical, and they asked for more practical concerns to be addressed. In general, they wanted more contemporary issues, current court cases, applicable statutes, and more focus on courts and the judiciary.

Conclusion

Longitudinal data on individual choice of courses, careers, and changing expectations and satisfactions simply do not exist. This snapshot, taken in 1990, has confirmed my impressions of current and past student interests and concerns. Nonetheless, it is unsettling to recognize that the pre-professional elements of the programme are considered the more important, by many students. It is probably true that an undergraduate Law and Society programme cannot – and perhaps should not – escape the penumbra of an established profession. Nevertheless, if the programme can continue to attract and influence non-professional students, it will have made some contribution, however minor, to the development of a new integrated field of law and society.

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ABA Awards Mini-Grants for 1990-91

by John Paul Ryan

We received another enthusiastic response to the announcement of the third year of our Mini-Grant Program. Sixty applications, of generally high quality and proposing projects of a wide variety, were submitted. The following nine awards were made:

California State University-San Bernardino (San Bernardino, CA) – $1,200
Law as a Social Tool: Preparing Students for the Year 2000
A series of guest speakers to (1) deliver lectures on such topics as affirmative action, the environment, white collar crime, and privacy, and (2) meet with interested faculty and small classes.
Project Directors: Marsha Liss (Psychology), Thomas Moody (Philosophy), and Frances Coles (Criminal Justice)

Dillard University (New Orleans, LA) – $1,100
A Critique of Law and Social Policy in Louisiana
Teaching students to analyze critically Louisiana social services policy through symposia, a juvenile court mock trial, and a visit to the state legislature.
Project Directors: Winona Somervill and Russell Henderson (Social Welfare)

John Jay College of Criminal Justice, CUNY (New York) – $1,200
Integrating Issues of Law and Cultural Pluralism
Development of exercises for the classroom and workshops, to help college students, faculty and staff better understand the connections between law and values in a culturally pluralistic society.
Project Directors: Serena Nanda (Anthropology) and Jill Norgren (Political Science)

Michigan State University (East Lansing) – $900
A Modular Course Unit on Business Ethics
Development of a unit on ethics in corporate decision-making, for use in business law and related courses.
Project Director: Jeffrey Nesteruk (Business Law)

Norwich University (Northfield, VT) – $1,100
Environmental Law Instructional Unit
Development of a unit on the relationships between law and the natural environment, for use in law and society courses; related campus lectures.
Project Director: William Clements (Sociology & Justice Studies)

Suffolk University (Boston, MA) – $1,175
Law, Myth and the Foundations of Social Order
Interdisciplinary faculty seminar to incorporate socio-legal themes into a general education program required of all first-year liberal arts students.
Project Directors: Steven Spitzer (Sociology) and Stephen Hicks (Law)

University of Maine (Orono) – $1,164
Little Wolf and the Bordeauxs: A Curricular Enhancement Project for the American History Survey Course
Creation of computer-based slides, illustrating the problems facing Native Americans and women in courts in the early 1900s, for use in campus and satellite history courses.
Project Director: Paula Petrik (History)

University of New Hampshire (Durham) – $1,200
Western Civilization through Law
Interdisciplinary faculty seminar designed to enhance course offerings and stimulate discussion of the place of legal studies in *liberal arts* education.
Project Directors: William R. Jones and Lucy Salyer (History)

Wheaton College (Norton, MA) – $900
White Collar Crime and the Law: A Guide for Undergraduate Students
Compilation of an annotated bibliography of books, articles, reports, and videos on white collar crime, for use by faculty and students.
Project Director: Robert Tillman (Sociology)

We encourage our readers to submit proposals to this year's competition (probable deadline: March, 1991). Guidelines will be mailed in November to everyone currently on the *Focus* mailing list. The staff welcomes pre-submission conversations on both the form and substance of proposals.

1991 ABA Conference on Litigation, Justice, and the Public Good

The ABA Commission's 7th annual higher education conference will be held April 25-27 (Thursday-Saturday) in San Diego, California.

Litigation, Justice, and the Public Good will be the theme for the conference. Panels will discuss the treatment of litigation in popular culture and the implications of litigation for public policy and social justice. Workshops will explore how these and related issues can be effectively taught in disciplinary and interdisciplinary courses.

All sessions will afford the opportunity for interchange among speakers and invited participants in an intimate and congenial setting. Speakers will be drawn from the humanities, social sciences, and law.

This is a *national* conference; we welcome applications from faculty, deans, and organization-based educators around the country. Accommodations and group meals, but not travel expenses, will be provided for 50 invited participants.

Application deadline is February 1, 1991. Those wishing to participate should send a *c.v.* and a letter of application to:

John Paul Ryan
ABA Commission on College & University Nonprofessional Legal Studies
541 N. Fairbanks Ct.
Chicago, IL 60611-3314

Belonging to America: Equal Citizenship and the Constitution
by Kenneth L. Karst
New Haven, CT: Yale University Press, 1989. 304 pp., $24.00 (cloth).

Judging the Constitution: Critical Essays on Judicial Lawmaking
Edited by Michael W. McCann and Gerald L. Houseman
Glenview, IL: Scott, Foresman Co., 1989. 453 pp., $18.00 (paper).

Reviewed by Leslie J. Vaughan

The publication of *Belonging to America* and *Judging the Constitution* will be welcome additions to the literature to those interested in contemporary constitutional lawmaking and its influence on social change. The authors of both volumes, from different points of view, offer difficult but rewarding arguments on the critical state of constitutional law today, particularly with regard to opportunties for equal citizenship for America's minorities, women and the poor at the end of what has been called the Second Reconstruction. The authors are strong proponents of an active, creative judiciary willing to adjust constitutional doctrine to contemporary needs, informed by past experience, new challenges and changing circumstances. Both find the courts best able to perform their leadership role when challenged to do so by ordinary citizens, activists, legal critics and scholars. The essays offered here present admirable examples of legal criticism and advocacy that can serve as important resources in bringing about progressive social change.

Kenneth Karst's *Belonging to America*, recently awarded the Organization of American Historians' 1989 James A. Rawley Prize, begins by acknowledging that "something has gone seriously wrong in the way our courts are addressing issues of constitutional equality." What has gone wrong, he argues, is that the courts treat equal citizenship as a formal, abstract right, rather than a "principle of substance." (p. 9) Karst's main effort is to argue that an idea of substantive equality or equal citizenship lies at the heart of America's civic culture. "A central theme in this book is equal citizenship, which has long served the nation as a unifying ideal and has emerged in our own time as a principle of American constitutional law." (ix)

To this reader, Karst's argument is less effective as legal history than as constitutional commentary. He skillfully manages to dismantle the "state action" doctrine of Fourteenth Amendment jurisprudence by illustrating the difficulty of assigning individualized responsibility to institutional or structural racism and sexism. In addition, he makes a strong case for enforcing and expanding affirmative action policies both on the grounds of social utility and in terms of compensatory justice principles. Finally, he offers a spirited defense of judicial activism, particularly in the area of civil rights, as essential to the task of building a national culture. As "law (is) a foundation for the sense of community," (p. 192) so we may look to our courts to establish the principles of that national community.

However, Karst is less convincing in his history of discrimination, which he regards as a betrayal of the nation's traditional commitment to substantive equality established in 1954 in *Brown v. Bd. of Education*. Yet even he concedes that Brown offered a timid example of remedial action without specifying a timetable or assigning institutional responsibility. Moreover, Karst does not establish what substantive equality amounts to or what it might be as a practical standard to guide judicial action, and he does not give much guidance in weighing whether, or to what degree, a particular right is essential to equal citizenship. One is tempted to ask: How much income is necessary for meaningful citizenship? What kind of participation is needed for full membership in America's public culture? Because these questions are not addressed, much of the force of his argument is weakened. Nevertheless, the book retraces a good deal of legal history in an unaffected, conversational tone, without recourse to academic discourse or technical jargon. Indeed, its greatest strength may be just that: as a history written for generalists and specialists alike, it is an admirable example of a narrative of inclusion in its own right.

Judging the Constitution, edited by McCann and Houseman, is both more and less inclusive than Karst's volume. The collection pulls together more than a dozen powerful, "critical, progressively oriented" essays (vii) on topics as diverse as the separation of powers, property regulation, pornography, the substantive rights of minorities and women, and the contribution of liberalism to constitutional lawmaking. Some of the authorship — among them, Rogers Smith, Deborah Rhode and Ronda Copelon — have been inspired by the critical legal studies (CLS) movement, the Law and Society movement of the 1960s or contemporary feminism, while others — including Donald Downs, Stuart Scheingold, John Brigham, Roger Simpson and Michael McCann — have been influenced by "populist," "progressive reform" or "neo-Marxist" scholarship, and a few — for example, Lief Carter, Judith Baer and William Halton — formulate more thoroughgoing re-evaluations of the categories of constitutional jurisprudence itself. What unites the contributions, according to the editors, is a shared background in the "dissident traditions" of legal history, and a common criticism of mainstream liberalism, questioning its ability to resolve fundamental social problems, particularly those relating to the unequal status of races, classes and genders in contemporary American society.

McCann's essay, for example, offers a critique of contemporary equal protection doctrine that remains "indifferent" to or protective of substantive social inequalities due to the "individualistic, exchange-oriented logic of public goods allocation" that underlies and reinforces America's liberal capitalist order. (p. 233) Put simply, because the courts do not address the "structural character" and causes of inequality, they have been unable to provide substantive remedies for America's poor beyond those caused solely by state origin or those which can only be resolved

by "individualistic, meritocratic and nonredistributive" principles (p. 256). Nevertheless, McCann, as do many of his colleagues, remains firmly convinced of the efficacy of law – and legal criticism – as a resource for social change. They, like Karst, call for a creative, responsive judiciary to craft egalitarian goals, urging the court to adopt the perspective of victims of discrimination rather than that of a neutral, impartial jurist whose embrace of color-blind principles and neutral standards leaves intact status quo values and hierarchies.

Both books are judicious, erudite studies of constitutional rights and liberties. Both are recommended for advanced undergraduate and graduate courses in legal history, law and society, constitutional law and thought, civil rights and discrimination, topics in judicial politics, and the politics of race, ethnicity and immigration.

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Briefer Book Notes

History and Power in the Study of Law: New Directions in Legal Anthropology
Edited by June Starr and Jane F. Collier
Ithaca, NY: Cornell University Press, 1989. 368 pp., $42.50 (cloth); $12.95 (paper).

An anthology of essays that grew out of an international conference on "Ethno-Historical Models and the Evolution of Law" in 1985. Starr and Collier provide a lengthy and generally excellent introduction, emphasizing theoretical issues and disciplinary trends in anthropology, as well as a clear rationale for the book's organization. Taken together, the essays provide both comparative and historical perspective, traversing the 18th, 19th and 20th centuries in locales as diverse as the United States, Norway, Uganda, Spain and Mexico.

The book's paperpack edition provides instructors of anthropology of law as well as law and society and comparative legal systems the opportunity to use some rich case studies as supplementary materials. For those less interested in a comparative focus, there are two excellent essays by June Nash (on a New England city) and Carol Greenhouse (on Baptist Georgia) that would make for useful reserve reading.

Feminism, Marriage, and the Law in Victorian England, 1850–1895
by Mary Lyndon Shanley
Princeton, NJ: Princeton University Press, 1989. 195 pp., $25.00 (cloth).

Shanley provides a succinct and highly literate account of legal reforms in 19th century Britain pertaining to marriage, divorce, child custody, and such related gender issues as protective labor legislation and the regulation of prostitution. The account probes, critically, the relationship between formal equality and substantive equality, noting that the 19th century feminists' vision of egalitarian marriage did not result from the legal changes effected. Overall, Shanley's book is less a study of legal change than an attempt to use law as a vehicle for examining political theory, feminist ideology, and social practices.

Many original historical sources are tapped, as well as leading accounts of 19th century British life. Shanley also cites and discusses such contemporary authors as Carol Gilligan, Lenore Weitzman, and Linda Gordon in the course of her historical accounts. An epilogue assesses the legacy of 19th century feminists for spousal equality in contemporary times.

Settling Disputes: Conflict Resolution in Business, Families, and the Legal System
by Linda R. Singer
Boulder, CO: Westview Press, 1990. 181 pp., $42.85 (cloth); $18.85 (paper).

This is a short, straightforward, and highly-readable overview of alternative dispute resolution (ADR). Singer first provides a brief review of the origins and growth of ADR, followed by a discussion and differentiation of such techniques as negotiation, mediation, arbitration, and hybrids. She then discusses dispute resolution in such substantive areas as divorce, corporate business, consumer complaints, and employer-employee relations.

Throughout, Singer – who is a lawyer and expert mediator and arbitrator – takes the view of the participants, rather than of the social observer. Her emphasis is on the practical, not the theoretical. Similarly, this book is not the place to find critical commentary (along the lines of the critics of "informalism"), though she does raise some larger issues in a concluding chapter on the relationship of ADR to the legal system. Nevertheless, the book's authoritative view of the practice of dispute resolution, its clarity of writing, and its generous use of case examples lend it to potential uses in the classroom.

Editor

News

Jamestown Community College recently published a pamphlet, "Comparative Legal Studies: Canada, the United States, and Individual Rights," under an ABA Mini-Grant for 1989-90. This twelve-page publication contains a background discussion of Canada, its national identity, and the Canadian Charter of Rights and Freedoms enacted in 1982, as well as comparisons with the United States. To obtain a copy or for further information about the project, contact: Professor Gregory P. Rabb, Department of Political Science, Jamestown Community College, 525 Falconer St., Jamestown, NY 14701.

University of Texas Symposium The University of Texas-Austin, will host "Feminist Practise: A Symposium on Women in Law and in Literature" as its 1991 Orgain Symposium, March 1 & 2, 1991 at the UT-Austin School of Law. Topics for discussion will include reproductive rights, race and gender, sexual harassment narratives, lesbian issues, and legal codification. Lynn Freed, novelist and author of the recently published "Home Ground", Angela P. Harris, professor of law at U.C. Berkeley and Judith Resnik, professor at the University of Southern California Law Center are to be among the symposium participants. For registration information, contact Rhonda Hyatt, Special Events Coordinator, University of Texas Law School, (512) 471-5151, ext. 287.

From the Editor

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provokingness, (4.37 and 4.15, respectively, on a scale from 1/poor to 5/excellent). Graphics were cited most often as the area in need of improvement. But almost half (46%) viewed *Focus* to be improving in quality; only 1% saw it declining. Feature articles, by far, are the most popular part of *Focus*: 70% of those expressing a preference liked feature articles best. Readers also provided many excellent suggestions for future topics that *Focus* might address.

More generally, 97% responded "Yes" to a question about whether *Focus* makes a "unique contribution" to the field ("It's the only publication which addresses liberal arts issues for legal studies teachers," remarked one). Others stressed its value in *teaching* ("It provides a forum for pedagogic issues; while I don't always agree — often I strongly disagree — I regard it as valuable"), and *professional development* ("I teach at a small college with a heavy teaching load; *Focus* helps me to stay up on areas I would not otherwise have time to").

Our first response to this feedback is to give greater emphasis to teaching strategies. Thus, *Focus* now has a new section, "Pedagogical Approaches," which in this issue contains an exchange about the techniques, and impact, of the Socratic method in the classroom. In the next year, we will be exploring possible changes in design as well. We welcome the continuing suggestions of our readers. Thanks.

Commission Hires New Staff

After two and one-half years of excellent service, Jean Pedersen leaves the Commission. Despite the heavy demands of the work, Jean managed also to complete her Ph.D. in history at the University of Chicago. She recently began as Instructor in Humanities at the University of Rochester's Eastman School of Music. We wish her well.

Replacing Jean as Project Manager for the Commission will be Joshua Lazerson. Joshua will coordinate most of our programs, including the annual conference, the mini-grant program, the syllabus clearinghouse, as well as the production of *Focus*. Joshua recently received his Ph.D. in history from Northwestern University, where he worked as a staff assistant for the International Studies Program. He has also served as Acting National Coordinator of the Mozambique Support Network.

Joining the Commission staff as our secretary is Pearl Lewis. Pearl will also assist with keeping the *Focus* mailing list up-to-date and with clearinghouse services generally.

Syllabus Clearinghouse

The ABA Commission offers a Syllabus Clearinghouse, consisting of more than 125 syllabi organized into 15 thematic categories ranging in price from $1-6. The syllabi vary greatly in length and detail, but many offer rich bibliographies and/or full descriptions of class assignments. Topical categories of syllabi include "Courts, Judicial & Legal Process," "Feminism and Gender Studies," "Jurisprudence, Philosophy of Law & Ethics," "Law and Society," and "Legal History & Culture."

For further information about the Clearinghouse, including an order form, contact Joshua Lazerson, ABA Commission on College and University Nonprofessional Legal Studies, 541 N. Fairbanks Ct., Chicago, IL 60611-3314; (312) 988-5736.

Liberty and Community

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with me — and if we think this is a bad situation — and many of us may not think so — do we get any help from the experience of other constitutional democracies? Or is our situation in the United States exceptional? We could, of course, look to Canadian public life and to the traditional emphasis in that country on the participatory model of democracy. We might also draw inspiration from Canada's attempt, even under its new charter of rights, to create a pluralism that facilitates bonding based on religion, language, and ethnicity.

The question is: Can we restore community? Can we revive civic consciousness in this country? Can we recapture a sense of citizenship without returning to a distant past, which in any event we are unlikely to recover? Part of the answer might be found in the constitutional jurisprudence of other liberal democracies with which we would be inclined to compare ourselves. This is one reason many of us who teach constitutional law at the undergraduate level are beginning to examine the jurisprudence of the American Supreme Court in the light of foreign constitutional case law.

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FOCUS on Law Studies

Teaching about law in the liberal arts

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American Bar Association

Teaching Civil Liberties in the Bicentennial Year

by Joel B. Grossman

Marking the bicentennial of the ratification of the Bill of Rights in 1991 offers the usual opportunities for public celebration; many will be little more than a reprise on the constitutional bicentennial of 1987. And, more than likely, they will send out the wrong message — that our rights are extensive, deeply embedded in our consciousness and political fabric, and secure; and that there is much to celebrate. This is not entirely untrue, of course, but those of us who teach about the Bill of Rights know that it is not the whole story. Thus if we do not already do so, we should use the occasion as an enriched opportunity for *cerebration* — for critical thinking (and making our students think critically) about the state of our liberties and about how they can most effectively be protected.

I suspect that most civil liberties teaching (I use "civil liberties" in its most inclusive sense, to include civil rights as well) — whether in free standing courses or incorporated into constitutional law courses — is Supreme Court based and case driven. Convenience and tradition are powerful disincentives to creative teaching. Of course the limits of an exclusively case approach are well known, and most of us do more (and think we are doing enough) to enrich our students' perceptions and understanding. But a few supplementary reading assignments, and perhaps a lecture or two, on the reality and implementation of rights, and the impact of court decisions, are surely inadequate. Perhaps the 1991 bicentennial will be the occasion for reducing our casebook dependence and Supreme Court fetishism; and for zero-based course planning.

In this brave new world, let the following thoughts (all too brief and certainly inadequate) be our guide!

First, civil liberties is both a social construct and a normative concept. Students must understand that the constitutional rights we teach about are not mere legal formalisms. They are part of a larger system of rights (and civic responsibilities) and allocation of power that cannot be understood apart from the political system. Students must consider what a "right" is, how rights are derived and enforced, how the inevitable conflict between asserted rights is mediated in our society, and how claims of right relate to democratic norms. They must confront the reality that rights are not uniformly agreed to, and are, in the most fundamental sense, politically based. Rights are relatively easy to create in the legal sense, but much more difficult to enforce, and thus to be realized by their intended beneficiaries.

"Rights consciousness" has become one of the most important social forces in our polity in the last half-century; indeed it is now probably the dominant form of interaction and perception between citizens and government. The

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ABA Sponsors Bicentennial Programs

The American Bar Association will be sponsoring a wide variety of programs, designed to increase the public's awareness and understanding of the Bill of Rights and to mobilize the legal community to participate in these programs.

For example, the ABA's Commission on Public Understanding about the Law has developed for use on mass transit a provocative series of advertisements, utilizing the suffragettes, Martin Luther King and others to highlight freedoms guaranteed under the Bill of Rights. Piloted successfully in 1990, the advertisements will begin to appear nationwide this year.

The ABA's Special Committee on Youth Education for Citizenship will sponsor a symposium in May, in conjunction with the Smithsonian Institution, on Teaching about the Constitution and Bill of Rights for teachers, educators, and curriculum specialists.

Publications available from the ABA include a Resource Book published jointly with the American Library Association, which provides program planning, key Supreme Court cases, and an annotated bibliography. For information on these publications, contact the ABA's Order Fulfillment Department at 312/988-5555.

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FROM THE EDITOR

I recently attended and participated in a Law-Related Education (LRE) Leadership Seminar, sponsored by the ABA's Special Committee on Youth Education for Citizenship (which promotes LRE in K-12 schools). One of the key speakers, Reginald Wilson, a Senior Scholar at the American Council on Education, challenged the group by arguing that the requirements for college graduation (and entrance) had been seriously diluted, citing as evidence that more than half of American colleges do *not* require their graduates to take, among many things, an American history course. Much of the assembled audience could be heard groaning . . . that this was surely too bad and undesirable.

After his speech, I raised my hand to inquire whether this was really so bad. After all, I pointed out, we teach students in elementary and high school about basic American history *several* times — as early as 4th grade, again by 8th grade, and yet again for one or two years in high school. Do we really have to teach *college* students, all over again, about general American history? Haven't they gotten "it," or had ample opportunity to do so, by the time of the high school diploma? Dr. Wilson responded, not unreasonably, that college students should be exposed to a *critical* perspective on history, one emphasizing conceptual understanding, critical thinking and multiculturalism — a perspective that doesn't emerge in the earlier teachings of history in elementary school, or even high school.

It strikes me, though, that this is too easy, too facile, a response that college-types readily give (and to which K-12 educators sometimes don't object, as with this audience). Are we sure that the teaching of history is so uncritical in the earlier years, so unworthy of respect by colleges? For example, the AHA's History Teaching Alliance has spent much effort trying to energize the teaching of history in the schools, through seminars and other programs linking college-level and high school history teachers. The Taft seminars have a similar program for high school government instructors. And Professor Susan Silbey of the Wellesley College Sociology Department, now doing research on law-related learning in K-12, remarked in an interview in the Spring, 1988 issue of *Focus*: "My observation of classes at this level [7th through 12th grades] suggests that teachers are as interested in developing *critical skills* as they are in assuring mastery of information."

Furthermore, are we so sure that college teaching about history is always so critical, multicultural, or whatever? Many of the national higher education reports of the 1980s, and more recent curricular debates about general education, suggest otherwise. Perhaps colleges should consider re-focusing the basic American history course along the lines of "Critical Perspectives on American History." Yet for reasons having to do with image, patriotism and political objectivity, most colleges aren't likely to do this. Alternatively, colleges could offer several levels of "introductory" American history — one basic and one or more advanced — and require students, by advanced placement, examination and/or college course, to meet a competency level, much as we do for freshman English. This would also offer well-prepared students the opportunity to take a more specialized or in-depth course, in lieu of needless repetition.

Nonprofessional legal studies, it seems, is another of those fields, like American history, where we have not yet articulated how college instruction can complement and enrich, rather than duplicate or unnecessarily overlap, K-12 (particularly high school) teaching. In part, this occurs because "interpretive" fields are so unlike English composition or algebra, where we can readily test students to see at what level they are functioning. In part, though, this occurs because we have too few data and too little discussion about the curricular links between high school and college, preferring even today to rely on comfortable but frequently inaccurate stereotypes about education.

So what are the implications for you, *Focus* readers who teach undergraduates about one or another aspect of law and the legal system? First, identify in advance key areas of competency for your course. Second, find out — by pretest, first-class discussions with students, etc. — what students *in 1991* know, the *sources* of their knowledge (previous courses, media, computer games, etc.), and their *deficiencies* of knowledge and critical thinking about these areas. Then, make adjustments so as to match classroom lectures and discussions (if not books already selected) with student preparation. Finally, for the most ambitious of you, meet with high school teachers of civics and history in your community, or at least review the texts they use, to find out how law is being taught, why, and what implications this may have for your own teaching.

In the final analysis, learning about the law and its role in society is a lifelong process. Indeed, the personal experiences that many students are likely to have later in life — as initiators and targets of litigation, in divorce, real estate and probate proceedings, even as parents of children arrested — will transform, and yet be shaped by, "book learning" from college and before.

FOCUS *on Law Studies*

Teaching about law in the liberal arts

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Actively Engaging Students in Study about the Law

by Tom Sweeney

Students frequently shy away from class participation because they don't want to appear uninformed, foolish, or stupid. Professors often avoid it because too many students don't prepare for class, class sizes are too large, students sometimes complain about being "uncomfortable," it requires risk taking, and it makes one vulnerable. None of these are sufficient reasons to abandon the requirement that students participate actively in class.

We should actively engage our students in learning about law because of the fundamental role of law in shaping our values and society, and because participatory learning and shared inquiry enhance skills necessary for citizenship in a self-governing society.

Developing Skills

Law in the liberal arts is a marvelous vehicle for enhancing the ability of students to:

- read, write, speak, and reason;
- tolerate confusion and frustration in the learning process;
- not depend on others for answers or, more importantly, for questions;
- clarify perplexing matters on their own;
- explore the fundamental significance of law to society;
- understand the relationship between law, power, and personal freedom.

Assuming you recognize the clear difference between the professional teaching *of* law and teaching *about* law in the liberal arts, what are some effective ideas for actively engaging students in learning about law?

Class Exercises

In my "Introduction to Law" course, I begin immediately with a role-playing exercise "No Vehicles in the Park" from *Street Law*, (West Publishing). Students play the role of park board members in adopting wording for signs in a new park. The sign "No Vehicles in the Park" raises questions of emergency vehicles such as police and ambulance, of garbage trucks, and a tank as a war memorial. In this exercise, students learn how to conduct a public meeting, the difference between the "letter" and "spirit" of the law, and the difficulty of drafting laws. Although students are often quite surprised by such a beginning, they report later that role-playing during the first class establishes the expectation that they will be actively involved in class sessions.

We also read the gospel accounts of the trial of Jesus in which students role-play judges, accusers, and witnesses; and *Susanna and the Elders* (from the Apocrypha), to demonstrate how literature can teach about law (in this story, the value of cross-examination); and we do a two-day mock trial based on *No Heroes, No Villains: The Story of A Murder Trial* (Vintage Books).

Constitutional Law

A major component of my "Constitutional Law" course is moot court competition. Useful "how-to" materials accompany Fleming, Murphy, and Harris' superb text, *American Constitutional Interpretation* (Foundation Press). Last spring, my students first argued the "right to die" case before young assistant State's Attorneys (who ask excellent questions and give helpful feedback to students). Finalists then argued the case to a three-judge panel, made up of a former Illinois Attorney General, a corporate counsel, and a university professor. After the arguments and the court's decision, the entire class and audience participated in a discussion (televised locally) of the legal, ethical, economic, political, and religious ramifications of the "right to die."

National Mock Trial Tournament

Hosted by Drake Law School, the Mock Trial Tournament alternates annually between a criminal and civil case. Students play the role of attorney and witness and learn first-hand how to conduct a trial from opening statements through closing arguments. The cases are highly interesting; students learn about a substantive area of law, trial procedure, small group dynamics, and leadership; and they enhance their reading, writing, speaking, and reasoning skills.

Put Yourself On Trial

Sometimes, spontaneous ideas work. Last year in the "Introduction to Law" class, students complained about the fairness of an exam. On the spot, I assigned two students who had received "A's" on the exam as attorneys for the class, two for my defense, and one as judge. I agreed to follow *whatever* ruling the judge made.

We spent the remainder of that class conferring with our attorneys and the next day we had direct and cross-examination (of me mostly). Although the judge tried to get us to settle, we didn't, and he eventually had to rule. As a result grades were raised for many, but it was well worth it. Students from that course still talk about "putting the professor on trial."

Write a Play

Last year North Central College held a three-day Civil Rights Conference. My class on "Congress" researched the legislative history of the 1964 Civil Rights Act, wrote a 40-minute one-act play, and performed it before a lunch-time audience. They acted out skits, read from debates in the *Congressional Record*, and showed excerpts from "Eyes on the Prize." Students learned about the law-making process and enjoyed performing before an audience.

For the same conference, my "American Courts" class researched *Brown v. Board of Education* and put on a 40-minute play starting with a skit in which Homer Plessy was ejected from his seat in a coach reserved for whites. Students learned about race, politics, and legal strategy.

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Using Law as an Interpretative Framework for the Study of American History

by Shirley J. Burton

In the Spring 1990 issue of *Focus*, Malcolm M. Feeley made a compelling argument for the integration of law into the liberal arts curriculum. "Law" he wrote, "is one of the universal human institutions, one of the great forms of social ordering . . . [l]ike the family, religion, the market, and politics . . . an ubiquitous institution." I could not agree more. But if I might be permitted to take up Professor Feeley's argument, I would suggest that by the middle of the nineteenth century, law had emerged as the dominant institution in American life, and had become arguably the single most important interpretative framework for the study of American history and culture.

During the first century of the republic, industrialization, immigration, migration, and urbanization all diminished the control of family and church, bringing fundamental changes to the social order. American social mobility nurtured the republican spirit of egalitarianism, but also eroded the security of place and nation. Self-policing communities seemed a thing of the past.

What emerged from this societal crucible included a new middle class identity with concomitant values and standards of personal conduct that valued self-made persons who disciplined themselves. In a marriage of moralism and materialism, wealth replaced birth as the measure of one's status, and character was substituted for class. Self-restraint provided class self-identification and promised moral and social order through inner controls. But by the beginning of the nineteenth century, some middle class Americans were becoming frightened by the openness of their society and the intemperate habits and abuses of power they saw about them. As the authority of church, family and community over the individual diminished, that of the law increased. Traditionally the final arbiter in matters of contract and property, the law was increasingly looked to during the nineteenth century to hold together the social fabric of the nation as well (see Michael Grossberg, *Governing the Hearth*, 1985).

American historians have long recognized the law as an important interpretative framework for the study of history; colonial court records have supported more than a generation of studies of Puritan society in New England. But scholars have been slower to utilize the later records of the judiciary system. However, as inquiry moves from the colonial era to the nineteenth and twentieth centuries, and civil law increasingly supplants church control as a means of enforcing social order and prevailing standards of conduct, the law becomes a correspondingly more powerful force in the social dynamic of human attempts to regulate the social order.

Court records are rich sources for the study and teaching about wartime dissent, economic cycles, naturalization, etc.

The study of statute law alone is insufficient. The American slavery debate of the 1960's is illustrative (see books by Herbert S. Klein, Frank Tannenbaum and Stanley M. Elkins). While some statutes are prosecuted energetically, others are enforced less vigorously or ignored altogether. Often laws are pressed into uses other than those for which they were intended. For example, mobster Al Capone was imprisoned for income tax evasion after attempts to prosecute him for prohibition violations were unsuccessful. Court records document the issues litigated and the judicial process.

The non-current records of the United States federal courts are held by the National Archives and Records Administration — the statutory depository of the permanently valuable records of the federal government. What records does the government consider permanently valuable? The United States Constitution, of course, and the Declaration of Independence. And Richard Nixon's resignation letter, Eva Braun's diary, Sirhan Sirhan's handgun, the investigation records of the *Challenger* disaster, and over 3 1/2 billion other documents, photographs, sound records, computer tapes, and other items that document the nation's past.

Among the most important and revealing of these records are those created by the *Federal Courts*. Court records of patent controversies and bankruptcies provide important sources for the study of business and economic cycles. Admiralty records chronicle over three hundred years of maritime history, including the *Amistad* mutiny, Civil War prize cases, and the importation of James Joyce's controversial novel *Ulysses* (Case A110-59, Box 1446, Admiralty Case Files, USDC-SNY, RG 21, National Archives — Northeast Region).

Treason, espionage, and sedition prosecutions document the role of the federal courts as primary interpreters of disloyalty throughout the nation's history, including the World War I orgy of nativism and xenophobia which brought freedom of speech to a national low. District Court prosecutions of speeches, newspaper articles, pamphlets, books, "boarding house rhetoric," and loose saloon talk demonstrate just how broadly disloyalty could be defined. While history books often provide the prosecutions of Eugene Debs and "Big Bill" Haywood as examples, court records add the cases of people like Troy Willard, who on March 7, 1918, speculated to the divers persons assembled at the business of B. R. Foster at Rushville in Schuyler County, Illinois that the

United States had no business in the present war, and that atrocities committed by the Germans were no more than the Americans themselves would do under the circumstances. As for throwing the German language out of the schools, Willard said he could see no reason why that should be done. Two months later a jury of his peers found Troy Willard guilty of violating the World War I Espionage and Sedition Acts and fined him $500 (*U.S. v. Troy Willard;* Records of the U.S. District Court, Southern District of Illinois; [hereafter cited as USDC, SDI]; Records of the District Courts of the U.S., Record Group 21; National Archives – Great Lakes Region.)

Charles Krueger got into trouble for insisting that "the Lusitania was sunk from the inside" and that "the I.W.W. were among the best people found in the U.S." (*U.S. v. Charles Krueger,* Criminal Case 15,894, USDC, SDI). Henry Moehle, a 52 year old farmer, was arrested for threatening to shoot down "any aeroplane passing over his premises and scaring his live stock," for which he pled guilty and was fined $500. (*U.S. v. Henry Moehle,* Criminal Case 15,955; USDC, NDI).

Though the U.S. Supreme Court is often looked to for legal clarification, World War I disloyalty determinations were almost always made in the federal district courts, where for the majority of federal cases, litigation begins and ends. The Supreme Court did not rule upon the Espionage Act until 1919 – after the fighting had ended, almost all the District Court cases had been tried, and it was too late for anything the highest Court (through *Schenck v. U.S.*) said to affect the prosecutions that occurred during the war.

Court files also document the ways the courts have enforced voting rights, controlled natural resources, and either granted or denied citizenship to immigrants. Regional archives holdings include naturalization records for film stars Greta Garbo, Bob Hope, Cary Grant, and Peter Lorre. Other court records document the difficulty that persons of non-European descent sometimes encountered in their attempts to obtain U.S. citizenship.

The nation's first immigration law in 1790 made citizenship available only to free white persons of good character. Tatos Osgihan Cartozian arrived in the U.S. in 1906, declared his intention to become a citizen in 1917, and was naturalized in the U.S. district court in Spokane in 1920. The secretary of labor decided to test the Cartozian case in the federal courts because Cartozian was an Armenian. When the case came up in 1924, the central question was whether or not Cartozian was a white man. Defense attorneys offered the depositions of three world-renowned scholars affirming that Armenians were Caucasians, but Cartozian was also required to bring his wife and four children to court for the judge to examine their complexions (Cartozian File, container 46412, Records of U.S. Attorneys and Marshals, RG 118, National Archives – Pacific Northwest Region).

Records of the territorial courts help to dispel myths and recapture the hard realities of the wild west, like the sworn statements of witnesses that before entering a saloon in 1876 to murder Wild Bill Hickock, Jack McCall was so drunk that he fell down in the street three times (Criminal Case 16, Criminal Cases October Term 1876, Second Judicial District, U.S. District Court for the Dakota Territory, RG 21, National Archives – Central Plains Region).

These and other federal court records are held in the National Archives building at 7th and Pennsylvania N.W. in downtown Washington D.C. and two suburban locations, 8 presidential libraries, 14 federal records centers and 12 Regional Archives Branches across the country (see sidebar for a listing of these). Court records in the Washington repositories include the Records of the Supreme Court of the United States (Record Group 267), Records of the United States Court of Claims (Record Group 123), and Records of the United States Commerce Court (Record Group 172). The Regional Archives hold the Records of the United States Court of Appeals (Record Group 276), and the Records of the District Courts of the United States (Record Group 21).

National Archives staff members make these and other records available for research, and conduct seminars, tours, and teachers' workshops. They consult with scholars and students on research projects, with teachers in search of primary documents for classroom instruction, and with the directors of national research projects. Contact the individual locations for information, to request a current guide to holdings, and for program schedules.

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Law, Literature and Humanistic Study

by Robert J. Christopher

In an earlier *Focus* article "Connection or Combination? Law and the Humanities" (Fall 1986), Robert A. Ferguson challenged us to examine the relationship of law and humanities. How vital are the connections between legal and humanistic scholarship and their influence on the curriculum of schools of law and programs of undergraduate education? Ferguson proposed that scholars and practitioners should evolve new combinations of law and humanities if we are to "nurture, test, and update an existing language of civic discourse in our own investigations of law and society."

In assessing the current state of law and humanities, law and literature can serve as a signal example of a field whose critical debate is altering the discourse, interpretive approaches and the textual canon in legal and literary scholarship.

One need not argue for the connection of law and literature. The figure of the lawyer, the metaphor of the trial and the theme of justice are elemental forces in western literary imagination. Since Chaucer gave the Man of Law his place in the human pilgrimage, the lawyer as character, narrator and protagonist remains a recursive figure in literature, in the passing more vilified, one might add, than honored.

Many regard Wigmore's list (1922) of law/literary novels and London's later (1960) expansion of such texts as law *in* literature and law *as* literature as benchmarks in the law and literature movement. Though London's distinctions proved useful in their profile of texts, the last decade, in particular, has given us a scholarship which has advanced the scope and critical import of London's categories.

London's prototype of law in literature is now greatly expanded to include influential work in areas of intellectual, social and constitutional history. Responses by literary writers to the values and enactments of their legal milieu have fresh pertinency. *In Law and Letters in American Culture* (1984), for example, Ferguson discusses the lawyer-writers, guided by the ethos of the Enlightenment, who shaped the Constitution and sought the fusion of classical learning and legal education. This republican ideal of the literate lawyer had, by 1840, dissolved before the forces of specialization, the democratization of the profession and the rise of positive law.

We can be now additionally persuaded that the Constitution was the text, with its promise of universal and unalienable rights, which the texts of many writers "cross-examined." The term is used by Thomas (1987) to describe the critical exchange among writers such as Cooper and Melville and the constitutional promise. More recently, Schiffrin (1990) invites us to re-examine the role the First Amendment played in the rise of "the American Renaissance" and how that amendment fostered Thoreau's civil disobedience, Emerson's transcendental aspirations and Whitman's celebration of democratic pluralism.

The lawyer as character, narrator and protagonist remains a recursive figure in literature.

The centrality of dissent as a theme in law and literature has made the "outsider" a central metaphor in viewing the law not as protector but as an arm of repression and state terror. The lawyer as protagonist in modern fiction is the subtitle to Richard Weisberg's *The Failure of the Word* (1984) in which the lawyer, as the hyper-verbal prosecutor-rhetorician, perplexes the inarticulate accused and distorts law's presumed credo of enlightened justice.

The narratives of the incarcerated, in both American and European letters, have become a genre which has given the "outsider" even greater prominence in the study of law and literature texts, as in the work of Franklin (1982) and Davies (1990). Writers from prison, these works propose, are both at the "margin and center" of the societies which have repressed or restrained them. Whether the site of incarceration be the Gulag or Attica, incarceration creates a strange comradeship between the dissenter and the thief, and their shared experience gives prison narratives a special edge on issues of guilt, responsibility and freedom.

Just as this scholarship has deepened the dimension of law in literature, law as literature inquiry reflects a branching into such concerns as hermeneutics — the theoretical study of meaning — with the emergent terms being adjudication and interpretation. What are the affinities between these modes of arguing for determinate meaning? In Posner's recent *Law and Literature* (1988), the coordinates of law and literature are "misunderstood" and their relationship is at best belletristic. Arrayed against Posner's view are the discussions (see also White's review [989] of Posner) in the *Texas Law Review* (1982) symposium on law, literature and interpretation.

In that issue what bonds the views of Rawls, White and others is belief in the communitarian view of interpretation. In White's terms, the loyalty of the jurist to the "culture of argument" and the literary critic's to the "culture of rhetoric" have sufficient affinities for "shared ambiguity" in a universe of indeterminate texts. Though the notion of the possibility or not of community constructed interpretation is centerpiece in discussions of meaning along the law as literature axis, the work of Fish (1989) and the first issue of the *Yale Journal of Law and Humanities* (1988) reflect yet further efforts to explore and refine the "interactive" nature of legal and literary interpretation.

Other law as literature currents seek direction in the application of poetics to jurisprudential texts. To what degree can literary analysis illuminate the structure and intent of legal writing? Since both law and literature seek expressiveness in a verbal universe, can we identify a common poetics? Such issues are reflected in the recent work on the judicial opinion as literary genre (Ferguson 1990) and the Constitution as

literary text (Weisberg 1986, Ferguson 1987), as well as the growing attention given to the *oeuvre* of such eminent jurists as Holmes and Cardozo.

If we consider the link between law and literature and the curriculum, we should remind ourselves that White's *The Legal Imagination* (1973), viewed by many as the seminal work in the field, presented itself as a course text for law students. In his choice of readings and the professional and personal questions he asks his students to examine, White revolutionized the relationship between literary texts and legal curriculum. His appeal to see connections between literary activity, professional judgment and personal self-knowledge had no less a goal than of fostering a more liberally educated imagination among his students.

White's view is that the imagination is the gateway to knowing law in its most comprehensive social, historical and personal contexts. A promising variation on White's approach is that pursued by Lofgren (1987) in the context he creates for readers to examine the full impact of *Plessy v. Ferguson*. As a reflection of the contemporary effort to expand curriculum to reflect the growing diversity and pluralism of our culture, proponents of law and literature encourage us to expand the community of learning by going beyond the mainstream canon, what West (1988) calls the dominance of the "textual community."

"Outsiders" do not belong to the textual community. We can only know their perspective if, as readers, we form "interactive communities" and thereby listen "to the narratives, the stories, the poems, the reflections, the memories, the hopes, the ambitions and the philosophies of the textually excluded." We need acts of the imagination and greater insight into historical and social forces if we are to appreciate the rise in American culture of alternative jurisprudence (Papke 1987) or to obtain the vision of the excluded "on being the object of property" (Williams 1988).

The future of the law and literature texts within the curriculum is likely to be a blending of such "great tradition" writers as Shakespeare, Melville and Dickens and the historical and legal milieu in which they lived, and such fictive speakers from the past as the "excluded" Geneva Crenshaw who becomes a surprising and articulate dissenter at the 1787 Constitutional Convention's debate on the issue of slavery (Bell 1989).

The major benefactors of this dynamic law and literature inquiry are likely to be literary and jurisprudential theory, the poetics of legal and literary texts, and law as a force in intellectual history. Receptivity among our students in law and undergraduate programs to these texts, critical perspectives and modes of inquiry bode well for law and literature study and for the vitality of humanistic study of law and society.

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Enriching the Classroom through Alliances with the Local Bar and Other Community Groups

by Marvin J. Cummins

In 1989-90 the American Bar Association's Mini-Grant program funded a proposal from Washington University in St. Louis for a project, *Frontiers in American Justice and Litigation*. The aim of the project was to bring university freshmen into the frontline of legal debates, yet to do so within the liberal arts tradition.

The project took a successful freshman program concentrating on law and society, and modified both the classroom techniques and course materials to allow for examination of changes in law that appear to be linked to Americans' future legal needs. Probing these issues, from a liberal arts standpoint, is valuable because these are debates about *public policy* aspects of law in American society, rather than debates simply about changes within the legal system.

Further, the project sought to test the prospects for facilitating greater interaction between the broader law-related community in metropolitan St. Louis and the undergraduate courses at Washington University which focus on law and socio-political processes. This "opening up" of the classroom, through invitations to law-related St. Louisans and student visits to legal arenas, would provide students a significantly richer sense of law in action.

The program, a collaborative effort between Washington University's Department of Sociology and the Metropolitan Bar Association of St. Louis, would give undergraduates access to practitioners and to academics actively involved in legal issues. Given the cooperation of the local bar association, its Educational Director, and the long-standing commitment of the legal profession to community service, the recruitment of legal practitioners was accomplished with relative ease.

Speakers discussed cases of interest to the students, such as toxic waste clean-up, death penalty issues, and changing divorce laws. Prosecutors, private attorneys, law professors, judges and agency administrators gave time to the program. Notable speakers sponsored by the program have included: Frank Susman, counsel for Reproductive Health Services in the *Webster v. Reproductive Health Services* case; the Honorable Warren Welliver, dissenting Missouri Supreme Court Justice in the Cruzan case; and Dr. R. Eugene Reynolds, Hazelwood East High School principal and litigant in the *Hazelwood v. Kuhlmeier* case. The accessibility of both practitioners and administrators, private and public, all interested in voicing their concerns as to the long-term direction of litigation, contributed to spirited interchanges in the classroom. When students are adequately prepared and the topic for discussion is policy-oriented, the recruitment of guest speakers can be a productive and stimulating teaching activity.

Enhancement of the in-class experience has been complemented by efforts to provide law-related opportunities for students outside the university. Students now have opportunities to enjoy directed internship experiences related to various legal enterprises. During the summer of 1990, one student interned in the office of the Educational Director of the Metropolitan St. Louis Bar Association, where he was responsible for a reorganization of the educational materials contained in the office library. Under the direction of the office manager, the intern reviewed and reorganized the library's extensive collection of educational materials that had been in circulation during the prior academic year. The intern identified and reclassified materials by legal subject matter and appropriate grade levels.

In the fall of 1990, a group of students who had been involved in the program took internships in the office of the Educational Director. The interns' primary responsibility was the collection of materials for use in mock trials sponsored by the St. Louis Bar throughout the metropolitan area. The students helped to develop hypothetical information for trial problems and witness statements, assisted in the coordination of trials, and served as jury members. Interns also reviewed video materials which were among the resources in the Educational Director's office.

Interns in the Educational Director's office also taught mediation processes to students in St. Louis schools. Through their case study work, their training of public school students and their role-playing as disputants and mediators, the interns honed their own skills.

The linkage between the St. Louis Metropolitan Bar and Washington University, realized through the project, is now going to provide for student internships with the Law and Citizenship Education Unit of the St. Louis City Schools. The Law and Citizenship Education Unit is developing what they believe will be the first public school law library in the United States. Washington University interns will be aiding in the organization of these materials.

In an effort to further broaden this interaction, freshmen at Washington University will be working with high school students from the St. Louis Public Schools. Students from one of the St. Louis magnet schools, the Center for Management Law and Public Policy, will meet the Washington University students for a series of discussions, the first of which will focus on the recent Supreme Court decision (*Board of Education of Oklahoma City v. Dowell*) regarding the relaxation of the standards for satisfying desegregation plans.

To date, this project has succeeded both in enriching the law-related education of Washington University students, and creating beneficial links among university students, students of the St. Louis public schools, and the greater St. Louis legal community.

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concept of rights is a venerable one, but its meaning has changed considerably. The Bill of Rights reflected the Lockean view of rights as a means of protecting us *from* overreaching and arbitrary government action. We retain this perspective, of course, but have also added the powerful idea of rights as entitlements to certain kinds of government services and protections from all sorts of hostile elements, social forces, and, indeed, our fellow citizens. While claims of rights entitlement are often directed to courts, their reality lies as much or more with legislatures and administrative agencies. Reciprocally, while courts have always been recognized as the prime protectors of citizens' rights, we have increasingly sought similar, and sometimes more comprehensive, protections from legislatures. The bottom line is that rights are of different kinds, have multiple origins, and can be lodged both in statutes and in judicial pronouncements. But important questions remain about which of our institutions should be primarily responsible for rights interpretation and implementation.

Second, while there is probably no society, certainly no complex and pluralistic one, which has recognized a greater range of individual rights entitled to protection or fulfillment than the United States, there is also a substantial gap between rights in the abstract and their reality in practice. Rights are not free goods; they are contingent and contextual; and, it would appear, not all are possible at the same time. We have mythologized their force, downplayed their impact on traditional interests (which can also be conceptualized as "rights"), and thus unwittingly created many unfulfilled, and probably unfulfillable, expectations. Rights often depend on resources, and the formal declaration of legal rights often, intentionally or not, merely reproduces deeply rooted economic and social inequality for those that lack such resources: the "haves," all too often, still "come out ahead."

We also continue to overestimate levels of public support and tolerance for the rights of others, despite much contrary evidence. There are many studies showing that professed belief in rights in the abstract and belief in tolerance is not necessarily accompanied by a willingness to recognize the rights of others – particularly those who are different or threatening to us. Tolerance is a fine aspiration, but hardly universal. Students of civil liberties must understand the social and political contexts of rights in order for any discussion of constitutional rights, and the Bill of Rights in particular, to be meaningful.

Third, to focus more directly on teaching about the Bill of Rights, we certainly need to pay more attention to history. The Bill of Rights was not the celebrated event in 1791 that it has become in the late twentieth century; it was, after all, primarily a reluctant political concession to ratification: "perfecting amendments" to the Constitution to limit the new federal government rather than an autonomous and complete charter of liberties.

We celebrate the Bill of Rights in 1991 largely because of what the Constitution has become . . . a true constitution of rights.

Three of the original states did not ratify the Bill of Rights until 1941. And it was the product of a very different society, one in which government played a relatively minor role in the lives of citizens. The "rights" which the Bill of Rights addressed were considerably more limited than they have since become. It was, after all, written by many of the same men who wrote a constitution supporting slavery (a terrible legacy that we may never be able to overcome), and for whom women and non-property owners were largely irrelevant politically. And the "First" Amendment, which we justifiably venerate today as the foundation of most of our liberties, was neither the "first" in Madison's original draft nor in the amendments submitted for ratification.

Today's Bill of Rights is thus at least as much a product of subsequent history, social conflict, and the growth of the modern state as the product of a rights commitment of the constitutional generation. Recall Justice Thurgood Marshall's controversial statement in 1987 that what he was "celebrating" was not the original Constitution (and Bill of Rights) but the Constitution that had "become"; and that for him the key to the transformation of a constitution of privilege, property, and limited rights into a true (though imperfect) constitution of rights was passage of the civil war amendments and, eventually, the incorporation of most of the Bill of Rights into the 14th Amendment. We "celebrate" the Bill of Rights in 1991 largely because of this transformation.

Fourth, and finally, it is probably a useful teaching tool to require students to think about alternative scenarios or conceptions of rights, such as: a) Do we, as a society, place too much emphasis on individual rights? [If so, which ones?] Does this preoccupation with rights have a negative effect on the establishment and maintenance of a cohesive, culturally integrated, body politic? b) Alternatively, per contra, what are the social costs and/or advantages of an enhanced focus on creating new rights and effectively implementing existing ones? c) The modern structure of rights, at least at the constitutional level, has largely ignored or dismissed claims of rights based on property. This is, of course, a substantial departure from Locke and Jefferson, for whom property and rights were largely indistinguishable. A number of conservative scholars (and Supreme Court Justices) have called for redressing the balance and reinvigorating, for example, the "takings" clause of the Constitution. Critics regard this, at least if pursued to extremes, as an ominous threat to the welfare state and thus to many other rights and entitlements. How should the balance be drawn? d) Opponents of the Balanced Budget amendment cite, as one of their fears, the possibility of a "runaway" constitutional convention [much like the original one] which would undermine, and perhaps even rewrite, the Bill of Rights. Is this the time, as the Constitution's third century has begun, to reconceptualize just what rights it ought to address and protect? What would a modernized "Bill of Rights for the twenty-first century" look like?

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The Republic of Choice: Law, Authority and Culture
by Lawrence M. Friedman
Cambridge, MA: Harvard University Press, 1990. 248 pp., $27.50 (cloth).

Getting Justice and Getting Even: Legal Consciousness Among Working-Class Americans
by Sally Engle Merry
Chicago: University of Chicago Press, 1990. 227 pp., $14.95 (paper).

Reviewed by Marlynn L. May

If you teach courses analyzing law as it affects, and is affected by, culture, society, and the individual, these two books in tandem will make an excellent addition.

Both of these books are about legal consciousness, from *very* different vantage points. Friedman's analytical vantage point is from above, a broad-stroked sociolegal description of the 'movements and trends' of change in legal culture. Chapter 1 sets the analytical plot. Positing a current "radical form of individualism" (the backdrop for the book's title) and the "ubiquity of law" in America, he asks "How does this individualism coexist with so much law?" Isn't there a paradox here, represented by a moral vacuum left from shrinking zones of traditional authority, which is then saturated with rules, regulations, and laws inclined toward colonizing our personal lives? In Chapter 2, Friedman gives some historical context, cataloguing the byways through which a 19th century individualism was transformed into its virtually unrecognizable 20th century offspring — atomistic individualism and isolated, lonely individuals. Chapters 3-6 render a portrait of the unique 'expectation of justice for all' that evolved simultaneously with modern individualism, and the unique societal responses in the form of a legal culture containing the dominant principles of injustice against no one, tenure in whatever station you hold, and security against failure. Together these principles when adhered to make it possible for any individual to "choose and lose, and choose again." Friedman eventually reveals (Ch. 5) that the paradox has no clothes, because "Many people believe that society *needs* a thick network of rules and rule-structures for the very purpose of protecting freedom of choice" (p. 62). Finally, Chapters 7-9 flesh out in more detail the affinity between law and modern individualism. He explores in Chapter 7 the 'celebrity society,' with celebrities symbolizing the scope of freedom everyone wants, acting as surrogate authority figures, role models, and mirrors in which we are reflected. Modern mass communication technology is the individual's connection with it all. Chapters 8-9 analyze the relativization (in modern society) of a whole range of conditions and behaviors (gender, religion, crime, mental illness, age), that transformed from 'deviant to minority' status the formerly shunted, the forgotten, the outcast and the morally profligate. Most everything, in the republic of choice, becomes a matter of personal taste, choice and life-style. Persons and groups, once powerless, become entitled minorities with legal status and rights to be claimed.

Friedman and Merry both vividly show the prominent place of law in fashioning modern individualism.

Merry's book, though on a similar mission, is very different in content and style than Friedman's. While Friedman is cool and abstract in analysis, Merry's ethnographic study takes us into the warm heart of people who 'live' legal culture, who 'own' legal consciousness. An ethnographic study based in two New England towns, Merry's work struggles to make sense of how people use courts, and why they do so at all. She brings alive the problems of predominantly working-class citizens. Merry uses "problems" advisedly because she is engaged in understanding how peoples' legal consciousness informs their daily problems, how the courts deal with and transform these problems, and how and why people resist such legal corruption of their problems.

Her book is rich with detail, but also nicely framed in analytical abstractions that grow out of and inform the stories she tells. We learn much about the two towns in which the people live, their social, economic, and historical roots, the types of problems the people have, and how this all intertwines to form legal consciousness or ideology (Chs. 2-4). She clearly differentiates peoples' 'problems' (personal/informal/intimate) from court 'cases' (impersonal/formal/legal), and observes their coexistence in a state of tension as they go to court (Ch. 5). The court then tries to transform peoples' problems into one of three discourses suitable to the court's needs — legal, moral, therapeutic — and thereby changes the nature of the peoples' problems and the kind of justice gained (Ch. 6). Ultimately many plaintiffs resist this transformation, and in Chapter 7 Merry "describes the experiences of people in court and the ways they come to use and to resist the court's construction and management of their situation" (p. 134). After beautifully rendered descriptive and conceptual analyses in the first seven chapters, Merry concludes with well argued theoretical reflections on "The Paradox of Legal Entitlement" (Ch. 8). The paradox is this: the law invites citizens to bring their personal problems to court; as people do so, the law becomes a form of secular authority; as the court takes over and redefines their problems the individual loses control and takes on a new dependency. Thus, " . . . a new relationship [is] forged between the individual and the state. The individual seeks to construct a social world of autonomy and individualism . . . by establishing closer ties to the state as a way to order family and neighborhood life . . . . These plaintiffs free themselves from the control of neighbors and spouses but tie themselves more closely to the state" (p. 182).

Merry and Friedman fit well together. Friedman paints in broad strokes 'movements and trends' of legal culture, and Merry does a skillful job of showing how, as her people dance with the legal

system, legal consciousness is shaped by, and shapes, that legal culture. Yes, she says, citizens' use of courts may well arise from a desire to escape from community. But it is much more than that, because simultaneously the legal system invites them to bring their problems to court "to construct . . . [an alternative] preferred mode of social ordering within family and neighborhoods" (p. 173). Fundamentally, these books are about how law shapes and changes social *and* individual definitions of reality, consciousness, and a "just" ordering of lives. As individuals' uses of the courts aggregate, *mutatis mutandis*, the law and legal culture is changed. Together, these authors give us a window to this dialectic.

However, these books are about much more than just law and courts. They are about the changed character of America and the individual American's character. As such they are positioned as excellent complements to other recent sociocultural analyses of social change and character, e.g. Bellah, *et al.* in *Habits of the Heart* and Bellah's earlier work, *The Broken Covenant*. Though Bellah and company wrestle with the meaning and implications of a changed America embodied in the enfeeblement of republican nationalism and the ascension of instrumental and expressive individualism, they fail to give even minor attention to the fundamental role and effects of law in this change. Friedman and Merry add an essential ingredient by showing vividly the prominent place that law and legal consciousness hold in fashioning modern instrumental and expressive individualism, and in undermining republican nationalism.

In the end, neither Merry nor Friedman is comfortable with the effects that law has wrought. An undercurrent in both of their works (Merry is clearest about this) is that law, and peoples' particular consciousness of law, may have opened a pandora's box. Have law, its institutions, and its practitioners taken on and been ascribed a moral authority and social responsibility that in the end they cannot fulfill? Has law (in its many vicissitudes) become its own worst enemy? Merry and Friedman give us plenty to ruminate on, without presenting or presupposing any 'right' answers to the questions raised.

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A Crime of Self-Defense: Bernhard Goetz and the Law on Trial
by George P. Fletcher
Chicago: University of Chicago Press, 1988, 253 pp., $14.95 (paper).

Reviewed by Joshua Lazerson

George Fletcher's book is ostensibly a study of the legal aftermath of the Goetz subway shooting in December, 1984 in New York. However, such a description is tantamount to describing *Crime and Punishment* as a simple murder story. The problem with Fletcher's offering is at the same time the source of its brilliance: its richness technically, philosophically and historically. Fletcher utilizes the Goetz shooting and subsequent trial to survey, and dissect, the criminal judicial process as a whole.

The central legal issue of the Goetz trial is the interpretation of the lawful use of "self-defense" as a justification for Goetz's actions. The beauty of Fletcher's analysis lies in his crafting, from this particular central issue, a tableau which incorporates the totality of factors influencing the jury's verdict. Fletcher examines the notion of self-defense: in its historical evolution; as filtered through the various biases of the society which will judge Goetz's act through the media and on the street; as a legal concept with strict tenets of applicability which must be met in fact; and finally as a construct which a jury of twelve people must weigh in the face of the evidence, the judge's instructions, the lawyers' admonitions and the juror's personal baggage.

As an introduction to law and the American judicial system, *A Crime of Self Defense* will undoubtedly startle and provoke students. Fletcher vividly evokes not only the fluidity of law, the opportunities for its interpretation and reinterpretation in the movement of cases between various courts and judges, but the context in which courts themselves must operate and live. The Goetz case raised highly sensitive issues of race and justice, fanned by a media that tended to portray Goetz as a hero and his victims as young punks.

A potential problem in using this as a text for undergraduates is not unlike one of the challenges the Goetz jury faced: compartmentalization. In the Goetz trial, the jury was challenged to mentally maintain separation between various aspects of the case against Goetz. His carrying an unlicensed gun was not an automatic indictment of the act of shooting itself. The challenge to students will be one of identifying and separating the various issues that Fletcher raises throughout the book. The thread of his argument revolves around the contested concept of self-defense. Yet students will find themselves challenged with historical ellipses, sociological observations and terminological discussions, while the author attempts to maintain the thread of the Goetz trial.

Fletcher's work could be a useful component for courses in law and society, the sociology of law, philosophy of law, and introduction to law courses. The book will engage students, and its willingness to speak to the most controversial contemporary issues will promote lively discussion.

Joshua Lazerson is Project Manager for the ABA's Commission on College and University Nonprofessional Legal Studies; he holds a Ph.D. in history.

Briefer Book Notes

The Social and Legal Status of Women: A Global Perspective
by Winnie Hazou
Westport, CT: Greenwood Press, Inc., 1990, 232 pp., $39.95 (cloth)

Hazou has written a useful though uneven analysis of the evolution and current status of the legal position of women. While Hazou's primary geographical focus is the United States, the role of the United Nations in the promotion of women's rights, and the gains made and obstacles faced by women in five other states (Argentina, Sweden, Egypt, India and China) are also discussed briefly.

The United States case study, which occupies the first half of the work, is an excellent legal, historical and sociological introduction to the status of women. Hazou's analysis ranges from the nature/nurture debate and theories of the evolution of law, to women and the family, the employment sphere, sexual violence and women's rights over their bodies. The strength of this section is not

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News

United States Air Force Academy, Department of Law has begun publication of a new journal, *The United States Air Force Academy Journal of Legal Studies*. The first volume of the journal includes articles on such diverse topics as a history of criminal punishment in the United States, Plato, Aristotle, St. Thomas Aquinas and the relationship of philosophy and law, and a constitutional analysis of the combat exclusion for women aviators. The editor stresses that the *Journal* "is more a social science journal than a law review," and submissions which focus on the theory or policy ends of law are more desirable than articles on law practise. Questions concerning publication in the *Journal* should be addressed to Captains Jim Moody or Steve Hatfield at (719) 472-3680 or at the *Journal of Legal Studies*, Department of Law, United States Air Force Academy, Colorado 80840-5701.

Fund for Research on Dispute Resolution (FRDR) Grants

The FRDR recently awarded eight grants in the areas of disputing and dispute resolution, bringing to 39 the number of grants awarded to date through its semi-annual program. Kathleen Blee and Dwight Billings (Sociology, University of Kentucky) received a grant to explore the community conditions under which violent disputes develop. William Flores, Renato Rosaldo, and Blanca Silvestrini (Chicano and Latin American Studies Department, Cal State-Fresno) were awarded a grant to investigate dispute handling in Latino and multicultural communities. Barbara Lakeberg (Political Science, Brown University) received a grant to explore racial and ethnic relations in Norway through interviews with officials, social workers and activists. Grants ranged from $14,000 to $74,000. For further information about the Fund, contact Juliana Birkhoff, program coordinator, Fund for Research on Dispute Resolution, 1901 L Street, N.W., Suite 600, Washington, D.C. 20036, (202) 785-4637.

Albany Law School Conference

The Albany Law School will host a conference, "Compelling Government Interests: The Mystery of Constitutional Analysis" September 26-28, 1991, in honor of Justice Robert H. Jackson, an Albany alumnus. Topics for discussion will include the nature of "interests," the functions of interests in the areas of family and criminal law and Justice Jackson's career in the context of "interest" issues. Scheduled speakers include Justice Sandra Day O'Connor and Chief Judge James L. Oakes of the Second Circuit. Inquiries should be directed to Professor Stephen E. Gottlieb, organizer; or Barbara Mabel, coordinator, Albany Law School, (518) 445-2311.

National Institute for Dispute Resolution Videos

As part of its courts program, the Institute has produced five videos depicting actual and simulated case studies of procedures used in court-annexed dispute resolution. The series, titled *Dispute Resolution and the Courts*, includes: An Overview (a summary of the uses of dispute resolution); Community Justice Mediation; Court-ordered Arbitration-Minneapolis; Court-ordered Arbitration-Pittsburgh; Summary Jury Trial. Sold singly, the tapes are $50 a piece, and as a 5 tape set, are sold for $200. For more information, contact Patrick J. Fn'Piere, Director of Communications, NIDR, 1901 L St., N.W., Suite 600, Washington, D.C. 20036, (202) 466-4764.

Briefer Book Notes
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maintained in the book's second half. In taking on the United Nations and five mini case studies, Hazou tries to do too much. While lauding the U.N. for its work on behalf of women, Hazou fails to make a strong case for the U.N.'s ability to effect real change, worldwide, at the national level. The case studies are interesting and may motivate students to seek further information, but at 7 to 11 pages per country, Hazou's cross-cultural chapter is more a collection of vignettes than a comparative essay.

Publications Available

Undergraduate Legal Studies Syllabi Clearinghouse.
14 categories, 146 syllabi. $2-8 per category, or $60 for all.

Teaching about Law in the Undergraduate Curriculum: The Contribution of Political Science. [published in the APSA's *Law, Courts and Judicial Process Section Newsletter*, Summer, 1985, pp. 1-5]. No charge.

Law, Liberal Education and the Undergraduate Curriculum. [published in *Legal Studies Forum*, Vol. 10, No. 1, 1986]. Reprints available. No charge.

Undergraduate Programs of Legal Studies, Law and Society, etc.: Overview and Tabular Summary. 1986; updated, 1988. No charge.

To request any of the above, write Joshua Lazerson, ABA Commission on College and University Nonprofessional Legal Studies, 541 N. Fairbanks Ct., Chicago, IL 60611-3314.

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